

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

IN THE MATTER OF:

Geotechnical Innovation, PLLC

Petitioner

SBA No. BDPT-598

Decided: January 10, 2022

APPEARANCES

Shane J. McCall, Esq., Nicole D. Pottroff, Esq., Christopher S. Coleman, Esq., Koprince Law LLC, Lawrence, Kansas, for Geotechnical Innovation, PLLC

William L. Gery, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On April 19, 2021, Geotechnical Innovations, PLLC (Petitioner) appealed the decision of the U.S. Small Business Administration (SBA) Associate Administrator for Business Development (AA/BD) terminating Petitioner's participation in the 8(a) Business Development (BD) program. The AA/BD found that Petitioner had engaged in a pattern of failing to make required submissions and responses to SBA in a timely manner. For the reasons discussed *infra*, I find that the AA/BD's determination was reasonable, and was not arbitrary, capricious, or contrary to law. The appeal therefore is denied. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

SBA's Office of Hearings and Appeals (OHA) adjudicates appeals of 8(a) termination decisions pursuant to 15 U.S.C. §§ 634(i) and 637(a)(9), and 13 C.F.R. parts 124 and 134. Petitioner timely filed the instant appeal on April 19, 2021.² Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Petitioner informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

² Ordinarily, an appeal of an 8(a) determination must be filed within 45 calendar days after receiving the determination. 13 C.F.R. § 134.404. Here, Petitioner received the termination decision on March 3, 2021. Forty-five calendar days after March 3, 2021 was April 17, 2021.

II. Background

A. Annual Review

Petitioner was admitted into the 8(a) BD program in December 2016. On November 2, 2019, SBA sent an automated e-mail to Petitioner, through the Certify system, reminding Petitioner that its Annual Review and associated documentation for Program Year 3 (December 2018 — December 2019) was due by January 1, 2020. (Administrative Record (AR), Exh. 14.) On December 2, 2019, a second automated e-mail reminder was sent to Petitioner. (AR, Exh. 13.) On December 5, 2019, Ms. Kenia E. Montaña, Business Opportunity Specialist for SBA's Richmond District Office, e-mailed Petitioner to advise that Petitioner's Annual Review was due by January 1, 2020. (*Id.*)

Petitioner did not submit the Annual Review information for Program Year 3 by January 1, 2020. On January 14, 2020, Ms. Monet K. Chapman, Business Opportunity Specialist for SBA's Richmond District Office, sent an e-mail to Petitioner warning that Petitioner's Annual Review was “past due” and “delinquent.” (AR, Exh. 12.) The e-mail directed that Petitioner must “**submit its annual review and required documentation, as stipulated in 13 C.F.R. § 124.112 and the participation agreement, as soon as possible, yet no later than close of business (COB) 1/24/2020.**” (*Id.*, emphasis in original.) Failure to provide the information by the deadline might result in termination from the 8(a) BD program. (*Id.*)

Petitioner did not submit the Annual Review information by January 24, 2020. On April 1, 2020, Ms. Montaña e-mailed Petitioner advising that, due to the COVID-19 pandemic, the Richmond District Office would permit delinquent firms an extension until May 1, 2020 to submit missing Annual Review documents. (AR, Exh. 11.) On May 4, 2020, Ms. Montaña again e-mailed Petitioner to state that the Richmond District Office had not received the missing Annual Review, and to inquire into the status. (AR, Exh. 10.) Ms. Montaña noted that “[i]n the event you are experiencing technical difficulties, please send an email to the Certify help desk at help @certify.sba.gov informing them of the issue and ccd me.” (*Id.*)

On June 5, 2020, Ms. Montaña sent another e-mail request to Petitioner regarding the Annual Review, entitled “Urgent-Action Required: Extremely Past Due Annual Review.” (AR, Exh. 9.) On August 13, 2020, Ms. Montaña sent another e-mail request to Petitioner regarding the Annual Review for Program Year 3. (AR, Exh. 8.) The e-mail cautioned that “[f]ailure to provide the required annual review with all supporting information/documentation, by no later than 8-28-2020, may result in the termination recommendation of your firm.” (*Id.*)

On August 27, 2020, Mr. Igor Soares, Business Opportunity Specialist for SBA's Richmond District Office, prepared a memorandum recommending termination of Petitioner's participation in the 8(a) BD program pursuant to 13 C.F.R. § 124.303(a)(7). (AR, Exh. 7.) The memorandum explained that “[a]s of today, August 27, 2020, [Petitioner] has yet to provide the

Because April 17, 2021 was a Saturday, the appeal petition was due on the next business day: Monday, April 19, 2021. 13 C.F.R. § 134.202(d)(1)(ii).

required financial statements, requested tax returns, reports, updated business plans, or other requested information or data within 30 days of the date of request.” (*Id.* at 1.)

B. Intent to Terminate

On August 31, 2020, the Richmond District Office sent Petitioner a letter entitled “Final Notice and Intent to Terminate.” (AR, Exh. 6.) The letter stated that SBA intended to terminate Petitioner from the 8(a) BD program due to a pattern of failing to make required submissions or responses to SBA in a timely manner, in contravention of 13 C.F.R. § 124.303(a)(7). (*Id.* at 1.)

The Richmond District Office highlighted that Petitioner had repeatedly failed to submit requested and required Annual Review documentation. (*Id.*) The first notification requesting that information was sent to Petitioner on November 2, 2019, via the Certify system. (*Id.*) A second notification was sent on December 2, 2019, via Certify. (*Id.*) A third notification was sent on January 1, 2020, via e-mail. (*Id.*) A fourth notification was sent on April 1, 2020. (*Id.*) A fifth notification was sent on May 4, 2020. (*Id.*) A sixth notification was sent on June 5, 2020. A seventh notification was sent August 13, 2020. (*Id.*) Despite these numerous requests and reminders, the Richmond District Office had yet to receive the required information. (*Id.*) The letter then stated that Petitioner would have 30 days from receipt of the letter to submit the missing information. (*Id.*)

On September 1, 2020, Mr. Soares sent an e-mail to Petitioner forwarding a copy of the “Final Notice and Intent to Terminate” letter, and reiterating that “[a]s of today, September 1, 2020, [Petitioner] has failed to submit its Annual Review in a timely manner and/or has submitted an Annual Review application that is deemed incomplete.” (AR, Exh. 5.) On September 2, 2020, Mr. Veldon R. Sallee, Petitioner's owner and President, responded to Mr. Soares's e-mail to ask whether the Annual Review was “the same as the Annual Update SBA Form 1450 found on the SBA website.” (*Id.*) Later that same day, Mr. Carlyle Shaw, an employee of Petitioner, also e-mailed Mr. Soares stating that Petitioner was working assembling the necessary information and asking for “a list of outstanding items that we need to send.” (*Id.*) Ms. Montaño then provided a list of four items that needed to be provided, noting that Petitioner's Annual Review for Program Year 3 was “extremely delinquent.” (*Id.*) First, Petitioner must ensure that its “SAM profile is linked to Certify.” (*Id.*) Second, Petitioner must “[u]pload all the required documentation in the SBA BOX folder created” before the deadline specified in the “Final Notice and Intent to Terminate” letter. (*Id.*) Third, if applicable, Petitioner must provide copies of any business or personal tax extension forms. (*Id.*) Finally, Petitioner must “[e]nsure [Petitioner's] financials follow 13 CFR 124.602.” (*Id.*)

On December 4, 2020, Ms. Christie L. Jones, Program Support Assistant for SBA's Richmond District Office, e-mailed Petitioner, noting that “[a]t this time, [Petitioner's] annual review is deemed delinquent.” (AR, Exh. 2.) Mr. Sallee responded to Ms. Jones later that same day, asserting that Petitioner had submitted “[its] Annual Review in October of this year.” (*Id.*) Mr. Sallee asked “[j]ust to be clear, am I delinquent for the past year(s), or for the current year?” (*Id.*) On December 7, 2020, Ms. Jones responded to Mr. Sallee, requesting clarification as to where Petitioner's Annual Review for Program Year 3 had been submitted. (*Id.*) Ms. Jones noted that, as of December 7, 2020, the Annual Reviews and associated documentation for Program

Years 2 and 3 were not in the Certify system nor in the BOX system, and those reviews were “extremely delinquent.” (*Id.*)

C. Termination

On March 3, 2021, the AA/BD terminated Petitioner's participation in the 8(a) program. (AR, Exh. 1.) The AA/BD explained that Petitioner was being terminated due to a pattern of failing 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, or other requested information or data within 30 days of the date of request. (*Id.* at 1, citing 13 C.F.R. § 124.303(a)(7).)

The AA/BD found that, notwithstanding repeated requests from the Richmond District Office, Petitioner had failed to submit the required Annual Review information. (*Id.*) Petitioner was notified and reminded of the requirement to submit Annual Review information for Program Year 3 as early as November 2, 2019. (*Id.*) On September 1, 2020, the Richmond District Office notified Petitioner that SBA intended to terminate Petitioner's participation in the 8(a) program. (*Id.*) Petitioner responded on September 2, 2020, stating that Petitioner was still working to provide the requested documents. (*Id.*) Petitioner later contacted the Richmond District Office on October 13, 2020, indicating that Petitioner was encountering technical difficulties in providing the information. (*Id.*) On October 14, 2020, the Richmond District Office provided guidance on how to submit the documents. (*Id.* at 1-2.) On December 4, 2020, Petitioner asserted that it had transmitted the Annual Review in October 2020; however, the Richmond District Office and the Certify system have no record “that an Annual Review for Program Years 2 or 3 were submitted.” (*Id.* at 2.)

The AA/BD found that “[a]s of today, SBA has not received [Petitioner's] Annual Review package.” (*Id.*) Annual Review information is not only required by 13 C.F.R. § 124.112, but also is essential to enable SBA to assess Petitioner's continued eligibility for the 8(a) BD program. (*Id.*) As a result of Petitioner's repeated failure to respond to requests for information, the AA/BD was terminating Petitioner's participation in the 8(a) BD program.

D. Appeal

On April 19, 2021, Petitioner appealed the termination to OHA. Petitioner maintains that the AA/BD clearly erred in finding “good cause” to terminate Petitioner under 13 C.F.R. § 124.303(a)(7). (Appeal at 1.) Petitioner asserts that on October 20, 2020, Petitioner “submitted the annual reports for Program Years 2 and 3 to the SBA Certify platform.” (*Id.* at 6.) Petitioner was unaware until April 2021 that SBA did not receive those documents. (*Id.*) Further, Petitioner was impacted by the COVID-19 pandemic and was the victim of a cyberattack that destroyed much of the company's data. (*Id.* at 1-2.) Petitioner argues that the history of communications between Petitioner and SBA shows that the AA/BD's decision to terminate was arbitrary and capricious. (*Id.* at 2.)

Petitioner claims that when it attempted to file its Annual Reviews for Program Years 1, 2, and 3, it experienced difficulties because Petitioner “had not completed its tax returns on

time.” (*Id.* at 4.) Completing timely tax returns became difficult because Petitioner lost staff to COVID-19 impacts, and because of a cyberattack on Petitioner's databases. (*Id.*)

On October 20, 2020, Petitioner “submitted the annual reports for Program Years 2 and 3 to the SBA Certify platform.” (*Id.* at 6.) Petitioner is unable to provide corroborating documentation from Certify, because Petitioner lost access to the Certify platform following termination. (*Id.*)

On November 2, 2020, Petitioner e-mailed the Certify helpdesk, with a copy to Mr. Soares, to inquire whether the documents would be “considered for the 2020 submission,” but received no response. (*Id.*) Petitioner concluded that SBA's silence meant that the October 20, 2020 submissions were fully satisfactory. (*Id.*) Although Ms. Jones indicated in her December 3, 2020 e-mail that SBA had not received Petitioner's Annual Review, Mr. Sallee did not see that e-mail until April 14, 2021, because Petitioner's employees responsible for e-mail were no longer with the company. (*Id.* at 6-7.)

Petitioner argues that the AA/BD erred in terminating Petitioner because Petitioner believed in good faith that it had submitted all required documents in October 2020. (*Id.* at 9.) According to Petitioner, the available record shows that Petitioner communicated with SBA in an effort to maintain compliance with the reporting requirements. (*Id.*) The AA/BD therefore incorrectly found good cause for termination under 13 C.F.R. § 124.303(a)(7). (*Id.*)

Petitioner urges that OHA should remand the matter for additional review, “because SBA has not sufficiently established that it has not received the pertinent annual reports from [Petitioner].” (*Id.* at 10.) A clear error of judgment may be found if SBA “(1) fails to properly apply the law and regulations to the facts of the case; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its determination that runs contrary to the evidence; or (4) provides an implausible explanation that is more than a difference between [OHA's] views and those of the SBA.” (*Id.*, quoting *Matter of Infotech Int'l, Inc.*, SBA No. BDP-205, at 5 (2004).) Here, Petitioner argues, by disregarding submittals and questions from Petitioner, the AA/BD failed to properly apply the law, failed to consider an important aspect of the problem, reached a decision contrary to the evidence, and provided an implausible explanation. (*Id.*)

Petitioner argues that the AA/BD improperly applied the regulation at 13 C.F.R. § 124.303(a)(7) because there was no pattern of failure to make required submissions. (*Id.* at 11.) Instead, Petitioner claims, Petitioner submitted the annual reports for Program Years 2 and 3 on October 20, 2020. (*Id.*) Petitioner “consistently responded to and provided information to SBA and, indeed, sent emails to SBA to confirm it had received all required information.” (*Id.*) Next, Petitioner argues that the AA/BD's decision is contrary to the evidence. (*Id.*) The AA/BD stated in her termination decision that Petitioner had “failed to submit [its] Annual Reviews for Program Years 2, 3, and 4,” yet Petitioner did submit its Annual Review information for Program Years 2 and 3 on October 20, 2020. (*Id.*)

Petitioner then argues that it experienced significant hardship and believed in good faith that the 2020 federal tax extension also would have extended to SBA's requirements to submit 2020 tax information. (*Id.* at 12.) Petitioner argues that by neglecting to consider the impact of

the COVID-19 pandemic on Petitioner, the AA/BD failed to consider an important aspect of the problem. (*Id.*)

Petitioner claims that SBA was well aware that 8(a) BD program participants were significantly impacted by the COVID-19 pandemic, and that the Certify system had technical issues. (*Id.*) Further, Petitioner's computer servers were hacked and Petitioner lost company data. (*Id.* at 13.) Petitioner argues that these factors should have been addressed and considered by the AA/BD in assessing Petitioner's annual reporting compliance, but the AA/BD failed to consider these factors. (*Id.*)

Accompanying its appeal, Petitioner offers a sworn declaration from Mr. Sallee, attesting that “[o]n October 20, 2020, I submitted the annual report documents and information for [Petitioner] for Program Years 2 and 3 through SBA certify.” (Sallee Decl. ¶ 8.) Mr. Sallee further states that “[o]n April 14, 2021, I first noticed an email dated December 3, 2020 from [Ms. Jones] stating that SBA had not received [Petitioner's] Annual Reports for Program Years 2, 3, and 4.” (*Id.* ¶ 10.)

E. SBA's Response

On June 11, 2021, SBA responded to the appeal. SBA argues that the AA/BD's decision to terminate Petitioner from the 8(a) BD program was reasonable and in accordance with law. The appeal should therefore be denied.

SBA observes that applicable regulations permit that an 8(a) participant may be terminated from the program for good cause. (Response at 6, citing 13 C.F.R. § 124.303(a).) Good cause includes “[a] pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide financial statements, requested tax returns, reports, updated business plans . . . or other requested information or data within 30 days of request.” (*Id.*, quoting 13 C.F.R. § 124.303(a)(7).) The AA/BD correctly found that Petitioner's conduct here met these criteria. (*Id.*)

Once admitted into the 8(a) program, a participant must meet certain requirements in order to remain eligible. (*Id.*) Such requirements include submission of Annual Review information to enable SBA to assess the participant's continued eligibility. (*Id.*, citing 13 C.F.R. § 124.112(b).) In the instant case, Petitioner failed to respond to multiple requests and reminders to submit its Annual Review information, breaching its Participation Agreement and rendering Petitioner ineligible for continued participation in the 8(a) BD Program. (*Id.* at 7.) Between November 2019 and March 2021, SBA sent at least nine e-mails and a Notice of Intent to Terminate requesting the submission of Annual Review information, and warning Petitioner that failure to provide the required information could result in termination. (*Id.*) Petitioner briefly responded to these communications on September 2, 2020, but neither of Petitioner's responses contained any substantive information. (*Id.*) First, Petitioner asked if the Annual Review was the same as the Annual Update Form 1450. (*Id.*, citing AR, Exh. 5.) Then, Petitioner requested a list of outstanding information. (*Id.*)

SBA disputes Petitioner's claim that Petitioner submitted its Annual Reviews for Program Years 2 and 3 on October 20, 2020. In support of this claim, Petitioner offers an e-mail dated November 2, 2020, addressed to the Certify helpdesk, in which Mr. Sallee states that Petitioner “recently submitted our Annual Review documents within the last 30 days. Will that submission be considered for the 2020 submission, or will I need to re-submit those documents by the January deadline to be compliant?” (*Id.*, quoting Appeal, Exh. B.) SBA has no record that Petitioner submitted any Annual Review documents in the 30 days leading up to November 2, 2020. (*Id.* at 8.) Further, Petitioner still has not produced the documents, even in response to the termination or as an attachment to the instant appeal. (*Id.*)

Petitioner's only other response to SBA's numerous requests and warnings occurred on December 4, 2020, in an e-mail from Mr. Sallee asserting that Petitioner had submitted “our Annual Review in October of this year.” (*Id.*, citing AR, Exh. 2.) Ms. Jones promptly responded to this e-mail on December 7, 2020, advising that no such submissions existed in the Certify or Box systems. (*Id.*) While Petitioner maintains on appeal that Mr. Sallee was unaware of Ms. Jones' e-mail until April 14, 2021, this contention is “belied by Mr. Sallee's response to [Ms. Jones'] email on December 4, 2020 noted above, in which he notes that he has received a notice that his Annual Reviews were delinquent.” (*Id.*)

III. Discussion

A. Standard of Review

A participant in the 8(a) BD program ordinarily may remain in the program for nine years so long as the concern maintains its program eligibility. 13 C.F.R. § 124.2. To maintain its eligibility, a participant must, among other requirements, annually submit information its servicing SBA District Office. 13 C.F.R. § 124.112. SBA may terminate a concern's participation in the 8(a) program prior to the expiration of the program term for good cause. 13 C.F.R. § 124.303. Under SBA regulations, “good cause” for termination exists, *inter alia*, if an 8(a) participant engages in “[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)(7).

An SBA determination to terminate a concern from the 8(a) BD program may be overturned on appeal only if OHA concludes that SBA's determination was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b); 15 U.S.C. § 637(a)(9)(C). So long as SBA's decision was reasonable, it must be upheld, even if it differs from the conclusion that OHA might have reached. 13 C.F.R. § 134.406(b)(2); *Matter of 4-D Constr., Inc.*, SBA No. BDPT-535, at 6 (2014).

B. Analysis

I see no basis to disturb the AA/BD's decision terminating Petitioner from the 8(a) BD program. The record reflects that, over the period from November 2019 to March 2021, SBA

officials made numerous efforts to notify and remind Petitioner of the requirement to submit Annual Review information, and specifically and repeatedly instructed Petitioner to submit its Annual Review and associated documentation for Program Year 3. Sections II.A and II.B, *supra*. In their communications, the SBA officials explained that Annual Review information is required by regulation; warned that failure to submit such information by the applicable deadline might result in termination; and highlighted that Petitioner's Annual Review for Program Year 3 — which originally was due January 1, 2020 — was “extremely delinquent.” *Id.* Given these facts, the AA/BD could reasonably find a “[a] pattern of failure to make required submissions or responses to SBA in a timely manner,” warranting termination under 13 C.F.R. § 124.303(a)(7).

On appeal, Petitioner maintains that it did submit its Annual Reviews for Program Years 2 and 3 on October 20, 2020. Section II.D, *supra*. This claim, though, is not corroborated by the existing record. SBA has no record of any such submission, and Petitioner has not produced copies of the missing documents, even in response to the termination or on appeal. Section II.E, *supra*. Further, SBA contemporaneously informed Petitioner, through Ms. Jones' e-mail of December 7, 2020, that SBA had not received the Annual Reviews and associated documentation for Program Years 2 or 3. Section II.B, *supra*. It thus appears that Petitioner knew, or should have known, that the Annual Reviews remained outstanding as of December 2020, well before the AA/BD issued her termination decision in March 2021.

Petitioner also argues that it faced hardships stemming from the COVID-19 pandemic and a cyberattack on its computer systems. Section II.D, *supra*. While I sympathize with Petitioner, there is no indication that Petitioner ever contacted the AA/BD or the Richmond District Office in effort to explain these extenuating circumstances, or to seek additional extensions of the reporting requirements beyond those which had already been granted. Petitioner therefore has not shown that the AA/BD's decision to terminate Petitioner's participation in the 8(a) program was unreasonable or arbitrary.

IV. Conclusion

The AA/BD conducted a thorough review of all the evidence; based her conclusion on that evidence; and provided a clear rationale for her conclusion. Petitioner has not demonstrated the AA/BD's decision was arbitrary, capricious, or contrary to law. Accordingly, the appeal is DENIED. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the U.S. Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

KENNETH M. HYDE
Administrative Judge