

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

IN THE MATTER OF:

CHARO Community Development Corp.

Petitioner

SBA No. WBC-100

Decided: December 17, 2008

ORDER

I. Background

On September 26, 2008, the Small Business Administration (SBA) notified Petitioner CHARO Community Development Corp. (Petitioner) that it would not renew Petitioner's Women's Business Center (WBC) awards SBAHQ-03-W-0010 and SBAHQ-06-W-0024 (the awards). The SBA notice stated that its decision was based on the "willful or material failure to comply with the terms of the Cooperative Agreement, including relevant OMB Circulars." Administrative Record (AR), Ex. 1.

The SBA notice provided that Petitioner did not adequately respond to certain findings in the Performance Review Report regarding the September 15, 2004 to September 14, 2005 period of performance. Specifically, the SBA alleged Petitioner failed to submit revised and corrected SF 269 and SF 270 forms, timesheets, ledgers, and accounting department reports. Petitioner disputes these allegations and submits evidence challenging the SBA's conclusions.

The notice informed Petitioner that it could appeal the decision to the SBA's Office of Hearings and Appeals (OHA) "in accordance with 15 U.S.C. § 656(i) and the procedures set forth in 13 C.F.R. § 134 *et seq.* and Appendix B of the WBC Notice of Award document."

On October 29, 2008, Petitioner appealed the SBA's decision to OHA. This is the first case involving the WBC Program to come before OHA.

II. Applicable Law

The statute governing the SBA's Women's Business Center Program provides that the Administrator "shall not suspend, terminate, or fail to renew or extend any such [WBC] contract *unless* the Administrator provides the applicant with written notification setting forth the reasons therefore and affords the applicant an opportunity for a *hearing, appeal, or other administrative proceeding under chapter 5 of title 5* [the Administrative Procedure Act or APA]." 15 U.S.C. § 656(i) (emphasis added).

The statute thus prohibits the SBA from refusing to renew a WBC award unless the WBC participant is given the opportunity for a review of the SBA's action. The SBA has not issued implementing regulations governing the WBC Program. The SBA has not specified, in regulations or procedural notices, which of the three means cited in the Small Business Act (appeal, hearing, or other administrative proceeding under the APA) should be used by a participant to challenge a WBC non-renewal. Moreover, there are no rules of procedure for a participant to request a "hearing, appeal, or other administrative proceeding."¹

A.

This procedural ambiguity leaves a participant at a loss for how its case should be adjudicated and prevents a participant from properly contesting the SBA's decision. This lack of a sufficient procedural notice amounts to a violation of a participant's due process rights.

The SBA's notice refers to Appendix B of Petitioner's Cooperative Agreement. AR, Ex. 22, at 124-130. Yet Appendix B's provisions conflict with the notice letter in that Appendix B only provides Petitioner with the option of a hearing under the APA § 555. AR, Ex. 22, at 129.

The SBA's notice stated that Petitioner could file an *appeal* petition with OHA in accordance with Appendix B of the WBC Notice of Award document. Yet Appendix B advises Petitioner that the SBA's notice will set forth "the specific facts and reasons for the decision, including appropriate legal authority, and will advise [a participant] that it may request a *hearing* with [OHA] in accordance with the provisions of part 134 of this title." Appendix B then states that hearings at OHA are subject to the APA § 555. AR, Ex. 22, at 129. Appendix B is also at odds with SBA counsel's argument. *See* Part B, *infra*.

In addition, while the SBA detailed the documents Petitioner failed to supply, the SBA's notice failed to provide adequate authority justifying its decision. The SBA cited Petitioner's failure to comply with "relevant OMB Circulars," which fails to adequately notify Petitioner of the authority justifying the SBA's non-renewal. If the SBA is relying on an OMB Circular, it must cite the specific provisions upon which it relies. Accordingly, the SBA's notice is inadequate and denies Petitioner due process.

B.

The SBA treats the petition as an appeal and asserts that I should apply the arbitrary and capricious standard of review. This argument is without merit. The SBA's November 26, 2008

¹ In contrast, the SBA's Small Business Development Center (SBDC) Program, 15 U.S.C. § 648, which is similar to the WBC Program, has implementing regulations that clarify SBDC Program procedures. *See* 13 C.F.R. Part 130; 13 C.F.R. § 130.700 (providing procedures for contesting SBDC suspensions, terminations, and non-renewals). Contrary to 13 C.F.R. § 134.102(o), which grants OHA authority to decide SBDC cases, 13 C.F.R. § 130.700(c)(5) provides that the AA/SBDC, not OHA, makes the final agency decision in an SBDC non-renewal. Thus, despite the language in 13 C.F.R. § 134.102(o), OHA does not have jurisdiction in SBDC non-renewal proceedings.

brief stated that OHA's review should "focus solely upon the issue of whether the [SBA's] decision not to renew the two WBC cooperative agreements with [Petitioner] was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' as stipulated under 5 U.S.C. § 706(2)(A)." The SBA's Answer also states that OHA should apply the arbitrary and capricious standard of review.

There is, however, no statutory or regulatory authority for OHA to apply the arbitrary and capricious review standard. Counsel's reliance on APA § 706(2)(A) is misplaced. That section sets forth the standards federal courts must use, rather than the review standard for internal agency reviews. *Compare* APA § 706(2)(A) (requiring a *court* to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ."), *with* APA § 557(c)(3)(A) (requiring an agency to include with each decision "a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" when an agency is required to use formal "on the record" adjudicatory procedures), *and* APA § 555(e) (describing the procedures for informal adjudication); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise*, Chapters 8 and 9 (discussing the procedures agencies must use in adjudications) and Chapter 11 (discussing judicial review of agency adjudicatory decisions) (4th ed. 2002).²

In addition, the SBA's reliance on the APA chapter 7 (§ 706(2)(A)) is at odds with the Small Business Act, 15 U.S.C. § 656(i), and the SBA's notice, both of which refer to administrative proceedings under the APA chapter 5.

III. Conclusion

Accordingly, the SBA failed to provide Petitioner adequate notice of its right to contest the SBA determination. Without such notice affording Petitioner a meaningful right to contest the SBA's decision not to renew its awards, the right to contest is meaningless.

Further, 15 U.S.C. § 656(i) allows the SBA to decide whether to afford a WBC participant a hearing, appeal or other administrative hearing under the APA. The SBA failed to avail itself of this mandate to regulate the process for contesting WBC decisions. Hence, there are no in-force provisions implementing the statute that permit a participant to contest a decision. Moreover, there is no authority for the SBA's reliance on the arbitrary and capricious standard of review.

² *But see* Small Business Act, § 8(a)(9)(C), 15 U.S.C. § 637(a)(9)(C) (statutorily applying the arbitrary and capricious standard of review to 8(a) Business Development cases).

Therefore, the SBA failed to provide Petitioner adequate notice of the reasons and legal authority for refusing to renew its awards and failed to implement review procedures mandated by the Small Business Act. Consequently, until the SBA corrects these deficiencies, it cannot continue with this non-renewal proceeding.

RICHARD S. ARKOW
Administrative Law Judge