



Issue Date: 20 August 2010

CASE NO. 2010-WIA-00007

*In the Matter of:*

NATIVE AMERICAN CENTER FOR CAREER MANAGEMENT, LLC,  
*Complainant,*

v.

U.S. DEPARTMENT OF LABOR,  
*Respondent.*

**DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION**

This matter arises under the Workforce Investment Act (“WIA”), 29 U.S.C. § 2801 *et seq.* and 20 C.F.R. Part 667, Subpart H. By motion dated July 21, 2010, accompanied by supporting declarations from Evangeline M. Campbell (“Exhibit 2”) and B. Jai Johnson (“Exhibit 3”) and Exhibit 1, tabs “A” – “E”, the Grant Officer (“GO”) has moved for summary decision. Native American Center for Career Management (“NACCM” or the “Complainant”) has not responded to that motion. However, on June 22, 2010, Complainant filed a Notice of Motion (“NoM”) which does not state with particularity the grounds therefore or specify the relief or order sought from this Office in compliance with 29 C.F.R. § 18.6. The NoM, however, does explain Complainant’s positions as to its denied grant application. The NoM states that NACCM showed “that more than 50% of its governing board is owned by a Native American” because Mr. Larney is president and sole-owner of NACCM and Mr. Larney “is a Native American” as indicated on pages 1 and 2 of the grant application. In addition, NACCM admits that its “Proposal was specific to the entire United States and its subparts in multiple entries in its introductory letter, Concept for Grant, Time Line, and Cost Proposal.”

The GO, through counsel, submits her Motion for Summary Decision (“MSD”) pursuant to 29 C.F.R. § 18.40 and § 18.41.

NACCM applied for grant funds made available through a competitive grantee selection process, under section 166 (29 U.S.C. § 2911) of the WIA, to provide Indians and Native Americans (“INAs”) with employment and training services. The record for the process documents that the GO acted reasonably and in accordance with the pertinent law and facts when she decided that NACCM’s grant application was non-responsive and excluded NACCM from competition for grant funds.<sup>1</sup> *See generally* Exhibit 1.

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<sup>1</sup> Review is not *de novo*, but is limited to determining “whether the ultimate decision reflects reasoned decision-making in accordance with the governing statutes, rule and regulations.” *Our Savior’s Business, Inc. v. U.S. Dep’t of Labor* (“OSB”), No. 2010-WIA-3, slip op. at 4 (ALJ June 23, 2010) (quoting *County of L.A. Community & Senior Citizen Servs. v. U.S. Dep’t of Labor*, No. 1987-JTP-17, slip op. at 4 (ALJ June 24, 1988)); *Edna Mills Restoration Project v. U.S. Dep’t of Labor*, No. 2005-WIA-5, slip op. at 2 (ALJ Oct. 5, 2005) (quoting *County of L.A. Community & Senior Citizen Servs.*, No. 1987-JTP-17 at 4). It is well-established that the Complainant’s “burden is a heavy one, and requires a showing that the Grant Officer’s decision was arbitrary and capricious, or was an abuse of discretion, or was not in accordance with the Act and its regulations.” *OSB*, No. 2010-WIA-3 at 4.

## BACKGROUND

The Department of Labor (“Department”) has effectuated its WIA section 166 mandate through the promulgation of 20 C.F.R. part 668, which sets the process for INA grantee selection. As provided by 20 C.F.R. § 668.240(a), on March 12, 2010, the Department issued a Solicitation for Grant Applications (“SGA”) which initiated the grantee selection process for approximately \$67 million in competitive grant funds for Program Years (“PY”) 2010 and 2011. 75 Fed. Reg. 11,926-35 (Mar. 12 2010); *see also* Exhibit 1 at E1 - E10. The SGA set eligibility requirements for applicants. 75 Fed. Reg. at 11,927-28. For example, the SGA required an applicant to have a governing board controlled by INAs, *id.* at 11,927 (Section III.A.), and to specify the intended service area.<sup>2</sup> *Id.* at 11,929 (Section IV.B.1.e); *see also* 20 C.F.R. § 668.240(c)(4); Exhibit 1 at E2. The SGA further specified that “[a]pplications that do not meet the conditions set forth in this notice will be considered non-responsive” and set the deadline for submitting the Notice of Intent (“NOI”) - Part A of the application, necessary to establish an applicant’s eligibility to compete for designation as an INA grantee, as April 12, 2010. 75 Fed. Reg. at 11,929 (Section IV.C); *see also* Exhibit 1 at E4.

NACCM filed a timely application, requesting \$7,639,229.00 in INA grant funds. The application stated that NACCM was INA-controlled, but made no reference to the existence of a governing board. Further, the application identified the intended service area as the entire United States. The application described an “Employment Readiness Education/Training Program” that would:

1. Impart standardized, generally accepted job-search, career-management and entrepreneurial principles to culturally diverse tribes and bands, which may be located in urban, sub-urban or rural areas,
2. “Individualize and customize” the standardized coaching/counseling programs for culturally diverse tribal participants, and for their specific geographic needs.

Therefore, this grant proposal suggests the use of . . .

1. A nationwide, on-line, Native American focused, job-search/career-management and entrepreneurial training system, as well as
2. On-site follow-up coaching/counseling for tribal participants at tribal location, facilitated by professional career counselors throughout the U.S.

Exhibit 1 at D14. The proposal provided that NACCM would sub-contract the performance of the grant-funded activities to non-INA organizations, with NACCM retaining some strategic and tactical involvement in the development of content; “actual selling” to INA groups; and the management of grant funds. Exhibit 1 at D26.

As with all other applications received by April 12, 2010, the NACCM application was referred to the Department’s program office, the Division of Indian and Native American Programs (“DINAP”), for the purpose of verifying that NACCM was eligible to compete for funding. DINAP reviewed the NOI

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<sup>2</sup> The SGA states that an eligible applicant, by definition, has a governing body with INAs comprising more than 50 percent of the governing board members and that the governing board “must have decision-making authority for the WIA Section 166 program.” Exhibit 1 at E2.

— Part A and reported to the GO that the Complainant had not identified a *specific* intended service area, did not provide copies of required articles of incorporation for nonprofit corporations or consortium agreements, and had not demonstrated that it had INA community support or a governing board controlled by INAs. Exhibit 1 at C1-C3; *see also* Exhibit 2 at ¶¶ 4-8. The GO confirmed DINAP’s findings and concluded that NACCM’s application was non-responsive. Therefore, NACCM was ineligible to compete for grant funds. The INA grantee selection process continued, with grants awarded and available funds obligated for all 134 service areas in the United States, by July 1, 2010.

On May 11, 2010, the GO notified the Complainant of its non-selection. Exhibit 1 at B1B2; *see also* Exhibit 3 at ¶ 11. On May 18, 2010, the Complainant filed an appeal with the Department’s Office of Administrative Law Judges (“OALJ”). Exhibit 1 at A3-A5. On June 10, 2010, OALJ issued a Notice of Trial and Pre-hearing Order. *Id.* at A1-A2. GO counsel discussed this case with NACCM representatives on July 20, 2010, but no issues were resolved. At that time, the GO sent NACCM a complete list of all INA grants awarded for PY 2010 and a copy of a proposal submitted by a successful PY 2010 applicant and informed NACCM that this MSD would be filed.

## DISCUSSION

Under 20 C.F.R. § 667.825(a), the review of a grant decision is “to determine whether there is a basis in the record to support the decision.” My review is not a *de novo* review, but is limited to determining “whether the relevant factors were considered by the Grant Officer in making his [or her] decision and whether the ultimate decision reflects reasoned decision-making in accordance with the governing statutes, rules and regulations.” *Edna Mills Restoration Project*, 2005-WIA-005 at 2 (quoting *County of L.A. Community & Senior Citizen Servs.*, 1987-JTP-17 at 4). Under 20 C.F.R. § 667.800, “only alleged violations of the [WIA], its regulations, grant or other agreement under the [WIA] fairly raised in the determination, and the request for hearing are subject to review.” The burden on the GO is one of production, and to that end, the submission of the Administrative Record shifts the burden of persuasion to Complainant to overturn the GO’s decision. The burden is a heavy one, and requires a showing that the GO’s decision was arbitrary and capricious, or was an abuse of discretion, or was not in accordance with the WIA and its regulations.

GO argues that, as a practical and legal matter, this case is moot, because the relevant grantee selection process has been concluded and all grant funds have been awarded. Therefore, no remedy is available through this proceeding and it should be dismissed. I find the GO’s argument unpersuasive as, if followed, I would be unable to decide any case where a GO acted in an arbitrary and capricious manner, abused her discretion, or was not in accordance of the WIA or its regulations as long as all funds get awarded before my review. This can hardly be the intent of the WIA, and I dismiss this argument as frivolous.

In the alternative, GO also argues that this MSD should be granted, because there is no genuine issue of material fact and the GO is entitled to summary decision as a matter of law.

Based on my review of the Administrative record (Exhibit 1), the GO’s MSD, and accompanying declarations (Exhibits 2 and 3), I conclude that Complainant has not shown that the decision not to award grant funds was arbitrary, capricious, an abuse of discretion, or not in accordance with the WIA and its regulations. Complainant’s grant application was deficient in many respects referred to herein, and the panel acted reasonably in rejecting it.

I adopt the GO’s factual background and legal reasoning and I find that the record supports the conclusion that the GO acted reasonably in excluding the Complainant’s application from the selection process as non-responsive. NACCM’s application and complaint show a mistaken understanding of the

INA program, the SGA, and the grantee selection process. In particular, the application and appeal completely disregard the requirements to demonstrate local INA community support for and involvement in the applicant's activities. Instead, NACCM presented itself as a future California non-profit corporation beginning operation in July 2010, owned and operated by an individual Native American, and without any governing board or community support whatsoever. No documentation as to NACCM's legal status such as articles of incorporation for nonprofit corporations or a consortium agreement was provided as required by 20 C.F.R. § 668.200(a)(1). In fact, it appears that NACCM was not in existence as of the time of its application, and its budget was merely a proposed future budget rather than an established past budget that can provide the required detailed description of leveraged resources provided to support the organization's grant activities. *See* 75 Fed. Reg. at 11,929.

Further, NACCM proposed to sub-contract virtually all performance under the requested grant to businesses with experience in generic human resource and media services but no INA community support or involvement and no experience providing employment and training services to INAs.<sup>3</sup> Moreover, NACCM requested a service area spanning the entire United States, *see* Exhibit 1 at D7, in complete disregard of the requirement for a "specific description of the geographic area being applied for by State(s), counties, reservation(s), subparts, or combinations thereof." 20 C.F.R. § 668.240(c)(4); *see also* Exhibit 1 at E4.<sup>4</sup> NACCM's request, at odds with the regulation-mandated system for allocating grant funds, *see* 20 C.F.R. §§ 668.200, .296, was un-fundable. These fundamental defects necessitated the GO's finding that NACCM's application was non-responsive. *Id.*

The Declarations provided by the GO (Exhibit 3) and the INA Program Manager (Exhibit 2) responsible for implementing the INA grant program explain in detail how – in compliance with WIA and the Indian Self-determination and Education Assistance Act, the implementing regulations, and the SGA – they both independently determined that NACCM should be disqualified, as non-responsive, from further consideration for a grant. Therefore, prior to the competitive phase of the grantee selection process, where responsive applications were scored by review panels based on the rating criteria, the GO properly excluded NACCM.

I also agree with the GO that prolonging this proceeding would be a misallocation of the Department's limited resources. The pertinent facts, as presented in the Exhibits submitted, fully support the GO's decision to find the Complainant's application non-responsive. In similar circumstances arising from the Migrant and Seasonal Farmworkers' Program, *see generally Edna Mills Restoration Project*, No. 2005-WIA-5, and the Green Jobs Program, *see generally OSB*, No. 2010-WIA-3, my colleagues have granted GOs' motions for summary decision. The same conclusion is appropriate in the present case. Accordingly, I find that Complainant has not met its burden to show that the GO's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with the law.

### **ORDER**

For the reasons stated above, I find that GO reasonably concluded that the Complainant was ineligible to participate in the competitive phase of the INA grantee selection process primarily because it did not establish that it had a qualifying legal status at the time of its application, its application was non-

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<sup>3</sup> These businesses would not themselves have been eligible to apply for INA grant funds.

<sup>4</sup> Further, NACCM requested \$7,639,339.00, a substantial portion of the approximately \$67 million available for the entire INA employment and training program. This amount substantially exceeded in size the largest grant award made for any one INA service area in PY 2010-2011. This further underscores the Complainant's failure to focus on gaining community support for its grant proposal.

responsive, and it failed to describe an eligible specific geographical service area. As a result, **IT IS ORDERED** that GO's Motion for Summary Decision is **GRANTED** and Complainant's petition for review is **DENIED**.

**IT IS FURTHER ORDERED** that the September 17, 2010 hearing date is **VACATED**.

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GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of this Decision and Order. *See* 20 C.F.R. § 667.830. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Exception must specifically identify the procedure, fact, law, or policy to which exception is taken. You waive any exceptions that are not specifically stated. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 20 C.F.R. § 667.830; Secretary's Order 1-2002, ¶ 4.c.(42), 67 Fed. Reg. 64,272 (Oct. 17, 2002). A copy of the Exception must be served on the opposing party. *See* 20 C.F.R. § 667.830(b). Within forty-five (45) days of the date an Exception by a party, the opposing party may submit a reply to the Exception with the Board. Any request for an extension of time to file a reply to the Exception must be filed with the Board, and a copy served on the other party, no later than three (3) days before the reply is due. *See id.* If no Exception is timely filed, the administrative law judge's decision becomes the Final Decision and Order of the Secretary of Labor pursuant to 20 C.F.R. § 667.830(b) unless the Board notifies the parties within thirty (30) days of the date of issuance of the administrative law judge's decision that it will review the decision. Even if an Exception is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the filing of the Petition notifying the parties that it has accepted the case for review. *See id.*