

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, O.C. 20036



.....
In the Matter of

CAMPESINOS UNIDOS, INC.
.....

Case No. 82-CPA-22
83-JTP-3

Stephen D. Cundra, Esq.
Michael R. Gottfried, Esq.
Thompson, Hine and **Flory**
1920 N Street, N. W.
Washington, D. C. 20036
For the Complainant

Frank P. Buckley, Esq.
U. S. Department of Labor
Office of the Solicitor
Room N-2'101
200 Constitution Ave., N. W.
Washington, D. C. 20210
For the Grant Officers

James L. Feldesman, Esq.
Boasberg, Klores, **Feldesman** and
Tucker
2101 L Street, N. W., Suite 906
Washington, D. C. 20037
For the Intervenor

Before: E. EARL THOMAS
Deputy Chief Judge

DECISION AND ORDER

This proceeding arises under the Comprehensive Employment and Training Act of 1973 (CETA), as amended, 29 U.S.C. 6 801 et seq. (Repealed October 13, 1982) and the Job Training Partnership Act (**JTPA**), 29 U.S.C. § 1501 et seq., and the respective Rules and Regulations issued **thereunder**, both found at Title 20 of the **Code** of Federal Regulations.

Statement of the Case

This proceeding concerns two grant selection processes--the first for Fiscal Year 1982 under CETA and the second for Fiscal Year 1984 under JTPA. These cases were consolidated by order dated December 13, 1983.

E- ALJ- 000303

Campesinos Unidos, Inc. (CUI) initiated the first case (82-CPA-22) by filing a request for a hearing on April 16, 1982 to seek review of the Grant Officer's decision not to select CUI for funding **in three of the five counties for which it had applied, although** a final determination was not issued until October 5, 1982 and it did not technically meet the requirements of a final determination. On September 22, 1983, CUI filed a motion for an expedited hearing in this case.

CUI's request for hearing in the second case (83-JTP-3) was filed on September 27, 1983 and again on October 23, 1983 and sought review of the Grant Officer's denial of CUI's petition for reconsideration dated September 16, 1983. CUI was denied all funding for Fiscal Year 1984. Center for Employment Training (CET) was granted the right to intervene in these cases.

By order dated December 13, 1983 these cases were consolidated. A hearing was held on January 20, 25, 26 and 27, 1984, at which time all parties were afforded full opportunity to present evidence and argument.

The findings of fact and conclusions of law **are** based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties and applicable statutes, regulations and case law. 1/

Issues

Whether the Grant Officers' partial non-selection of CUI for Fiscal Year 1982 under CETA and total non-selection of CUI for Fiscal Year 1984 under JTPA were arbitrary and capricious, an abuse of discretion or lacking a rational basis. It involves the following sub-issues:

(1) Under **82-CPA-22**:

(a) whether the panel scores were computed properly:

(b) whether it was proper for the Grant Officer to consider factors other than the scores, and if **so**, whether he relied on one-sided information and false facts; and

1/ The following abbreviations will be used in citations to the record: DOL # - Department of Labor's Exhibits; CUI # - CUI's Exhibits; and TR - Transcript of Hearing.

- (c) whether the Department of Labor's decision to place CUI and CET in the deferred category was arbitrary and capricious.

(2) Under **83-JTP-3:**

- (a) whether the panel waived certain format and content requirements of the Solicitation for Grant Application (**SGA**);
- (b) whether a panel member was in error on his rating of **CUI's** administrative capability with regard to on-site visits,
- (c) whether it was error for the panel members to rely on the "15 percent deviation rule" in determining planned versus actual performance;
- (d) whether there was an error by panel members in considering the need for delivery agents;
- (e) whether the panel members discriminated against CUI because of its writing style; and
- (f) whether CUI should have been given three bonus points as the incumbent when awarding funding for Fiscal Year **1984**.

Findings of Fact

1. CUI is a non-profit corporation which provides services to migrant and seasonal farmworkers in five counties, Orange, Riverside, San Diego, San Bernardino and Imperial, in Southern California. (TR **695, 696**)

2. CET is a non-profit corporation which provides services to migrant and seasonal farmworkers in **18** counties in Southern California, including Orange, Riverside, Imperial, San Diego and San Bernardino. (CUI **#6**)

For **82-CPA-22**

3. By Federal Register notice dated May **5**, 1981, applicants were invited to submit preapplications and requests for funding under the Migrant and Seasonal Farmworkers Programs of CETA for Fiscal Year 1982. (DOL **#1**, Tab T)

4. By letter dated July 14, 1981, CUI submitted its funding request for Fiscal Year 1982 in which it sought funding for the counties of San Diego, Orange, Riverside, Imperial and San Bernardino, California.

5. In July 1981, CET submitted its funding proposal for 15 counties in California including the five for which CUI sought funding.

6. The "Handbook for Section 303 Grant Process" outlines the procedures to be followed by the Department of Labor in selecting grantees for migrant and seasonal farmworker programs in Fiscal Year 1982. (DOL #1, Tab S) This Handbook stated that a panel would be used to rate and score program proposals under certain detailed requirements. Id. This Handbook also provided that the panel reports would be reviewed by the staff of the Office of Farmworker and Rural Employment Programs (OFREP) for comments and recommendations and that in the selection of potential grantees, the Director of OFREP would consider the following factors: the panel ratings, monitoring and quarterly reports, the comments received by the A-9S Clearinghouse, recent audits, evaluation data, and any other reports related to the applicants, and perhaps additional validation information. The Director of OFREP would make the final selections with the approval of higher authorities. Id.

7. The panel which reviewed the Fiscal Year 1982 funding proposals consisted of two members and gave CUI a composite score of 50 and CET a 49 and recommended an award to CUI of four of the five contested-counties. (DOL #1, Tab N) Each organization's score was obtained by averaging the individual scores of the two panel members for each of the six ratings criteria, rounding off to the next highest number, and then adding these six averages together for the total score. Id. If the two panelists' total scores had simply been averaged, CUI would have received a 48 and CET a 48.5.

8. In September 1981, the Director of OFREP, Lindsay Campbell, in consultation with Daniel Cox and Cleofun Adams of OFREP, recommended CUI for funding in Imperial and Riverside Counties and CET for San Diego, San Bernardino and Orange Counties. (TR 31-45, Testimony of Daniel Cox) It was decided that the scores of CUI and CET were so close as to be insignificant and that CET actually won the scoring if the numbers were just added. **Thus**, the five-county area was divided between the two applicants. In order to determine how to divide the counties, the nature and history of the two organizations and the character

of the counties were considered. There was also some emphasis on the loss of **CET's** capitalization costs in skills centers already built if the counties in which those centers were located were given to CUI, with the concomitant capitalization costs it would have to incur, and on the performance of each organization. (TR 39-45, Testimony of Daniel **Cox**; TR 196-198, Testimony of Lindsay Campbell) It was agreed that the traditional program mix of CUI was best suited to providing services in **rural counties** and that it had developed better supportive services than CET, although it did have some high-level skills training, whereas CET excelled in skills training for industrial, and not agricultural, jobs. Id. Next, it was determined that Imperial and Riverside were **the** most rural counties and emphasized agricultural jobs while San Diego and Orange counties were the most industrialized and San Bernardino **was** a mixture of both. Id. This determination was based on information in the two **funding proposals** and on Daniel **Cox's** knowledge of the five counties, which information was later confirmed by the California employment service. Id.

9. Lindsay Campbell's recommendation was referred to William Kavinsky, the Grant Officer, who agreed with it, in September 1981. (TR 133, Testimony of William Kavinsky)

10. In October 1981, the Department of Labor decided to place some of the applicants for funding in a deferral category for 60 days because of their serious problems in the past as reflected in audits, General Accounting Office reports or otherwise in order to investigate those problems. A notice in the Federal Register of October 27, 1981 notified applicants of the deferral. (DOL #1, Tab M) CUI and CET were both deferred and each **was also** notified of the deferral by telegram dated October 27, 1981. (DOL #1, Tab L) These telegrams stated that

[b]ased upon information available, a serious question exists about the capacity of your organization to effectively manage a CETA, Section 303 grant. In order to assure that CETA funds will be effectively managed, the Department has decided to institute a management compliance review of your organization in order to determine whether these questions should be a basis for non-selection of your organization as a grantee*

11. CUI was notified by letter dated April 16, 1982 of the reasons for its deferral designation. (DOL #1, Tab F) The deferral was due to the findings of **a 1981** review of a 1976 audit report which found (a) a lack of documentation problem with regard to "loss of wages" for board members and (b) a significant problem evidenced by a series of loans and

advances of a business nature whose collectibility was highly uncertain. Id. The review was conducted in order to determine **if the fiscal practices** that gave rise to the disallowed costs relating to these transactions had been corrected and/or if the practices were continuing even though the disallowed costs had been repaid pursuant to a settlement agreement. Id. Employees of the Department of Labor verified these **reasons**. (TR 147, Testimony of William Kavinsky; TR 243, Testimony of Margaret Crosby; TR 200, Testimony of Lindsay Campbell)

12. CET was placed in the deferred-category for a "series of things" which apparently included violations of DOL property procurement regulations concerning building leases. (TR 244, Testimony of Margaret Crosby) The firm conducting the Financial and Administrative Management Survey on CET also disclosed certain other transactions because of the possibility of organizational conflicts of interest. (DOL #1, Tab K) These transactions involved wholly owned subsidiaries of CET established to purchase real property and equipment for leaseback to CET. Id.

13. Department of Labor employees testified at the hearing that they would not have deferred either CUI or CET. (TR 84, Testimony of Daniel Cox; TR 200, Testimony of Lindsay Campbell) The deferrals apparently were the result of a change in policies by a new administration. Id.

14. The Department of Labor established a task force to review the problems of the applicants placed in the deferred category. (TR 166, Testimony of William Kalinsky) Financial and Administrative Management Surveys of these applicants were conducted by certified public accountants. Both CUI and CET were rated acceptable, although it was agreed that CUI should be monitored closely since it was not rated above a three in any area. (DOL #1, Tab J) See DOL #1, Tab K for the survey results on CUI and CET.

15.. Both CUI and CET were removed from the deferred category and notified by telegrams dated February 26, 1982 that they were selected as potential **grantees--CUI** for Riverside and Imperial Counties and CET for San Diego, San Bernardino and Orange Counties.. (DOL #L, Tab I) These awards were in keeping with the recommendations of Mr. Campbell and Mr. Kavinsky. Grant agreements were negotiated with CUI and CET and funding for Fiscal Year 1982 was awarded.

16. The parties stipulated at the hearing that Proteus Adult Training, Inc. received a score of 60 from the panel and was selected for three of the four counties for which it had applied and that County of Kern received a 62 and was selected

for Kern County (the other county for which Proteus had sought funding). (CUI #1) Proteus, but not Kern, a first-time applicant, was placed in the deferred category. (DOL #1, Tab M).

17. Employees of the Department of Labor testified that no policy existed wherein if one organization was deferred and another competing organization was not the second organization would receive the grant. See TR 201, Testimony of Lindsay Campbell.

For 83-JTP-3 ,

18. On May 27, 1983, the Department of Labor published a "Solicitation for Grant Application" (SGA) for Fiscal Year 1984 Section 402 JTPA grants in the Federal Register. 48 FR 23932 et seq. The SGA set out the procedures to be followed by both the Department of Labor and potential grantees in the grant selection process. According to the SGA, in order to receive funding, a grantee had to go through three stages: the pre-condition for grant application, the competitive review process and a responsibility review. 2/

19. In July 1983, CUI and CET submitted their respective funding proposals to Grant Officer Edward Tomchick. (DOL #2, Tab D; CUI #6) CUI's was for the same five counties at issue in case number 82-CPA-22: Imperial, Riverside, San Diego, Orange and San Bernardino Counties. CET's proposal was for funding in numerous counties including the five sought by CUI.

20. The SGA provided that all proposals would be rated by a competitive review panel in accordance with the criteria and point system described therein. 48 F.R. 23933, 23936. The "Solicitation for Grant Application Proposal Review Panel Instructions" provided additional instructions to panel members. (DOL #2, Tab E)

21. The Department of Labor set up a panel consisting of three employees from the Department's Employment and Training Administration. They were William F. Delaney (designated as the panel chair), Brenda Hamlin and Carmelo Milici (the only member with experience in migrant and seasonal farmworker programs, although only limited experience, if any, with CUI or CET). The panel members were provided forms on which to record their deliberations and one form showing the performance of each current grantee.

2/ Only the competitive review process is at issue in this proceeding.

22. Panel members individually reviewed and scored, with written comments, approximately three proposals a day and then met every few days to discuss each proposal and arrive at a consensus score. (TR **370-373**, Testimony of William Delaney) Mr. Delaney, as panel chair, was also required to prepare a panel report which included a summary of panel proceedings, the aggregate technical point rank of each proposal, a narrative explaining the strengths and weaknesses of each proposal, and a summary technical rating sheet for each proposal. (DOL **#2**, Tab E; Panel Instructions)

23. The SGA provided that proposals 'should not' exceed 75 pages of double-spaced **unreduced** type exclusive of eligibility documentation and letters of support and commitment. 48 FR 23935. **CUI's** proposal was 75 pages long. (DOL **#2**, Tab D) **CET's** proposal included 66 pages of text but attached thereto were copies of the resumes of key staff (in single-spaced type). (CUI **#6**)

24. All three panel members testified at the hearing that they considered the **75-page** limitation to be a guideline and that while they were not required to read beyond 75 pages, they could do so. (TR 398, Testimony of William Delaney; TR 549, 550, 556, Testimony of Brenda Hamlin; TR 398, 407, 408, Testimony of Carmelo Milici) In all cases except one, each panel member read beyond 75 pages. (TR 642, Testimony of Carmelo Milici) Both **CUI's** and **CET's** proposals were read in their entirety.

25. CET also included in its proposal copies of an "Executive Summary," 'Center for Employment Training Accountability Report, FY **82**,' and "**CET**, Registered Trademark and Industry Working in Partnership to Serve People.' CUI included in its proposal articles of incorporation and bylaws.

26. Both Mr. Delaney (TR 408) and Mr. Milici (TR 647) testified that they did not think additional materials (beyond those required by the SGA) were prohibited.

27. In his comments on the administrative capability section of **CUI's** proposal, Mr. Milici stated that **there** was no mention of **on-site** visits. (DOL **#2**, Tab C)

28. On pages 11 and 12 of **CUI's** proposal, on-site visits as an element of **CUI's** monitoring process are discussed. (DOL **#2**, Tab D)

29. In order to rate current applicants' previous program experience, panel members were given a worksheet entitled 'Worksheet for Question C I' which detailed the planned versus actual performance of current grantees, along with the percentage of

deviation, for Fiscal Years 1982 and 1983. (DOL #2, Tab B) T h e s e worksheets defined substantial, failure to provide services as a deviation of more than 15 percent in at least one-half of the performance categories. Id. The respective worksheets for CUI and CET were given to the panel members.

30. Mr. Delaney testified that **CET's** application was the first he reviewed which contained the above-described worksheet (TR 373) and that he changed his score for CET (from a 10 to a 14 for the first subfactor of category B) on the basis of information provided to him by Mr. Milici. He testified that Mr. Milici explained, the 15 percent deviation rule, i.e. 15 percent is an acceptable range of performance. (TR 449) Both Mr. Milici and Ms. Hamlin followed the 15 percent deviation rule.

31. Ms. Hamlin commented in her rating of **CUI's** proposal with regard to the program approval and delivery system criteria that CUI did not provide a list of delivery agents and the services to be provided by each. (DOL #2, Tab C) Mr. Milici and Mr. Delaney also questioned whether CUI would have subcontractors or not. Id.

32. On page 68 of its proposal, CUI **stated** that it would operate its program directly without subcontractors and would be the only delivery agency. (DOL #2, Tab D)

33. The SGA provides that an applicant is to include a list of delivery agents and the services to be provided by each, if applicable. 48 FR 23936. .

34. The Chairperson's Summary Sheet for CUI states that the "narrative is confused, needs editing...a leaky narrative." (DOL #2, Tab C). Mr. Milici noted in his own comments that the "[n]arrative is difficult to read in many places. There are long run-on sentences and (sic) the syntax leaves much to be desired." Id.

35. The panel awarded **CUI** a score of 88 and CET a 96. (DOL #2, Tab c)

36. Edward **Tomchick** testified at the hearing that if an organization was found responsible, that is, passed the responsibility review portion of the process, he looked solely to the panel scores to determine the winning grantees so that the highest scorer won in the case of applicants competing for the same territory. (TR 522, 533)

37. Mr. Tomchick also testified that a "three point rule" was followed wherein if an incumbent grantee scored within three points of a higher scoring competitor, the incumbent received the grant. (TR 521,534) He testified that the rationale behind the three-point rule was that when two proposals are that closely scored, both grantees can do the job so other factors such as incumbency should be considered since incumbents already have established programs and do not, for example, require start-up costs. (TR 534)

38. Mr. Tomchick testified that CUI was mentioned as an incumbent during the meeting in which potential grantees were chosen. (TR 529)

39. CET was awarded all five of the counties for which both it and CUI had applied (and others as well) on the basis of its higher score in a decision made on August 12, 1983. (DOL #2, Tab A; TR 512, Testimony of Edward Tomchick)

40. By letter dated August 26, 1983, CUI was notified that it was not selected for funding. (DOL #2, Tab A)

41. On August 30, 1983, CUI filed a petition for reconsideration which was denied by the Department of Labor on September 16, 1983. (DOL #2, Tab A)

Conclusions of Law

I

The issue in both case numbers 82-CPA-22 and 83-JTP-3 is whether the respective Grant Officer was correct in not selecting CUI for funding in three counties in Fiscal Year 1982 and for no funding at all in Fiscal Year 1984.

The standard of review by which this issue shall be determined is whether the Grant Officer's decision was arbitrary and capricious, an abuse of discretion or was not in accordance with law. In the Matter of Indian Human Resource Center, Inc., 83-JTP-4 (May 14, 1984). This standard also applies to the JTPA part of this case where the regulations provide that applicants are entitled to administrative review with respect to "whether there is a basis in the record to support the Department's decision." 20 C.F.R. § 633.205(e). Such a standard is necessary because of the considerable amount of discretion which must be given the procurement officer when awarding federal funds. See In the Matter of Northwest Rural Opportunities, Inc., 84-JTP-3 (January 26, 1984).

More specifically, the arbitrary and capricious standard consists of a two-part inquiry where government procurement decisions are involved: (1) whether there was a clear and prejudicial violation of the requirements governing the competitions or (2) whether the procurement officer's decisions on matters committed primarily to his own discretion had no rational basis. Kinnett Dairies, Inc. v. S. C. Farrow, 580 F.2d 1250 (5th Cir. 1978); Kentron Hawaii, Limited v. Warner, 480 F.2d 1166 (D. C. Cir. 1973).

Furthermore, pursuant to CETA, the party requesting the **hearing--CUI** in this case--**has** the burden of establishing the facts and the entitlement to the relief requested. 20 C.F.R. § 676.90(b). Under **JTPA**, the Grant Officer has the burden of production in order to support his decision and the party seeking to overturn that decision--again, **CUI--has** the burden of persuasion. 20 C.F.R. § **636.10(g)**. The burden on CUI to prove that the Grant Officers' decisions in these cases were arbitrary and capricious is a heavy one. Kinnett Dairies, supra.

Pursuant to these standards, the following conclusions of law are made with regard to whether the respective Grant Officer was correct in the decision to only partially select CUI for funding in Fiscal Year 1982 and to not select CUI at all in Fiscal Year **1984**.

IL

The Fiscal Year 1982 CETA Selection Process

In order to award funding to organizations for Fiscal Year 1982 under the migrant and seasonally employed farmworkers program, the Grant Officer utilized a competitive process which included a rating of all funding proposals by a two-person panel. The Regulations specify the criteria to be used in reviewing funding requests. 20 C.F.R. § **689.206-2**. **CUI's** allegations do not concern the rating process per se, however, but rather certain events that occurred after the **panel rated** all funding proposals. The Regulations are not specific with regard to what happens after all the funding requests are reviewed and rated. The "Handbook for Section **303** Grant Process" does provide some other requirements that must be followed once each proposal is scored. (DOL #1, Tab S) Finally, the Regulations do provide that the Department of Labor has the right to defer designation of any organization. 20 C.F.R. § **689.206-1(c)(2)**. With these factors in mind, each of **CUI's** and/or **CET's** allegations shall be considered.

(a) The panel scores

The panel which reviewed both **CUI's** and **CET's** proposals gave **CUI** a score of 50 and **CET** a 49.

If only scores are considered, it appears then that CUI "won" the panel competition and should have **been** awarded **fund-**ing in all five of the contested counties. However, the Grant Officer decided not to rely just on **the panel** scores. (Whether that decision was correct shall be discussed infra.) But, in any event, the scoring was not as clear-cut as it may seem. As explained, supra, on page 4, the scores of each grantee were not obtained by a simple averaging process. For if it had been, CET would have scored a 48.5 and **CUI** only a 48. The discrepancy arises because CUI was aided **by the** fact that many of its individual criteria ratings were rounded up while **CET's** were not (since its numbers were evenly divisible). See TR 133, Testimony of Daniel Cox. This error is not **significant**, however, in view of the Grant Officer's decision that the scores were too close to rely upon anyway and his subsequent reliance on other factors.

(b) The Grant Officer's reliance on factors other than the panel scores

CUI has not alleged that it was improper for the Grant Officer to have considered factors other than the panel scores in deciding to whom to award funds for the **five** contested counties. Instead, CUI has alleged that the Grant Officer **relied** on one-sided information and false facts. (**CUI's** brief, page 39)

The "Handbook for Section 303 Grant Process" provides that in selecting potential grantees, the Director of the Office of Farmworker and Rural Employment Programs (**OFREP**) shall rely on a combination of the following factors: (1) panel ratings; (2) monitoring and quarterly reports; (3) the comments received by the A-95 Clearinghouse; (4) recent audits; (5) evaluation data; and (6) any other reports related to the applicants.

Numerous officials from the Department of Labor testified at the hearing that both organizations' past performance was very good. See e.g. TR 268, Testimony of Cleofun Adams. These officials also **believed** it would be unfair to award all five counties to just one of these organizations. See e.g. TR 39, Testimony of Daniel Cox. Thus, they decided **to divide** the counties between the two organizations. The two factors that were relied upon to determine how to divide these counties were (1) the character of each of the five counties and (2) the nature and history of each organization. (TR 39, Testimony of Daniel Cox) As to the character of the counties, it was determined that Imperial (**CUI's** home base) and Riverside Counties were the most rural and that Orange and San Diego Counties were the most industrialized. (TR 41, 42, Testimony of Daniel Cox) San Bernardino County was determined to be industrialized in part and rural

in part. Id. These conclusions were based on information in the two **proposals** and on Mr. **Cox's** own knowledge and on-site observations of the five counties (obtained through his position as government authorized representative to CUI and CET and acting supervisor of Western states). (TR 41) This view was later confirmed by information received from the California employment service. (TR 43)

CUI has not alleged that **OFREP's** perception of the character of the five counties was in error. In fact, Avanteor Ramirez, the executive director of CUI, agreed with **OFREP's** characterization of the counties. (TR 697, Testimony of Avanteor Ramirez) Mr. Ramirez testified that

. . . the Imperial valley is the most rural area, **and** then the other valley, the Riverside County, those two counties is [sic] very rural. The number one industry in these counties is the agricultural related_.

San Bernardino and San Diego and Orange County, they have more industry, different industries, the principal in San Diego and Orange County.

(TR 697) **CUI's** concern with this issue is actually whether it was a proper factor to consider at all in deciding to whom to award funding.

In determining which counties to award to each organization, the nature and history of CUI and CET were considered. **CUI** was viewed as being very effective in rural counties because it excelled in supportive services, its skills training involved mostly agriculturally-related jobs, and it was very effective in isolated rural areas whereas CET was viewed as being excellent in skills training for industrial jobs but with little emphasis on supportive services. (TR 40, Testimony of Daniel Cox) See also TR 198, Testimony of Lindsay Campbell.

CUI does contest the facts used to support **OFREP's** determination of the nature and history of the two organizations. Specifically, CUI charges that the Grant Officer was erroneously told that CUI does not have skills training centers in some of these counties when, in fact, **it** does. Mr. Ramirez testified that CUI had training centers in all five counties in 1981. (TR 698, 699) He said

. . . we have a very good skill center in San Diego area. We have for leads and milling machines, new medical controls. These, say, heavy capacity for more or less to train 20 to 25 students at a time.

Then we have another skills center in Orange County for electronic assembly and electronic technician. We have another in San Bernardino County for welding, and another in Riverside for our computers. We have another in Imperial County for diesel mechanics.

¶ (TR 698)

Mr. Cox testified, however, that he did inform Mr. Campbell, the Director of OFREP and the one who made the final selection recommendations to Mr. Kavinsky, the Grant Officer, that CUI had some operations in the three counties later awarded to CET but added that they were relatively small ones. (TR 61) Mr. Adams testified that Mr. Cox explained to him and Mr. Campbell that CET's skills training was of higher quality and that almost all of its operation concerned skills training whereas CUI's emphasis was on supportive services and its skills training was not a major part of its operations. (TR 279, 280) He further testified that Mr. Cox was not specific with regard to the actual kinds of training provided by each but rather discussed each organization's broad program mix. (TR 279-283) Mr. Campbell supported Mr. Adams' testimony instating that the decision on how to split the five counties was based on the traditional program mix of CUI, which was best suited to providing services in rural areas, whereas the capabilities, facilities and resources of CET were best suited to less rural counties and to areas where the need for skills training other than farming was more readily apparent. (TR 198)

It seems, then, that the Grant Officer was aware that CUI had skills centers in all five counties. But in reviewing the testimony of the witnesses it is clear that the deciding factor in determining how to divide these counties was not which organization had what particular skills training in each county, but rather what was the approach of each organization and how did that approach best meet the needs of the farmworkers in each county. It is obvious from reading the respective funding proposals of CUI and CET that each follows a different approach, as to the best way to train these workers. CUI's emphasis, as stated in its own proposal, is on a mix of skills training and supportive services with providing these services as the first objective. (DOL #1, Tab U, pages 2-4, 22) CUI also does not force workers to relocate to urban training centers if they wish to stay in the rural areas. Id. On the other hand, CET's primary goal, as stated in its proposal, is to provide top quality vocational training in high demand skills with workers referred to other organizations for supportive services. (DOL #1, Tab V, pages 31, 39) Thus, the fact that each organization had skills centers in all five counties and that all of CET's training was not in high technology fields

were not the major considerations. **It was** reasonable for Department officials to conclude that each organization's program mix was best suited to particular counties depending on the character of those counties, especially when it was previously decided to divide these five counties. I cannot find that this approach was unreasonable or that the particular division of the counties was inappropriate when the character of the counties is considered, especially since all the parties were in agreement as to the agricultural or industrial nature of each county. The process used to divide the counties was clearly a considered and informed process. ^{3/} And while these factors may not have been specifically authorize³ by the "Handbook for Section 303 Grant Process," they were based on monitoring and quarterly reports and other evaluation data which is authorized by the Handbook.

(c) The Department of Labor's decision to place CUI and CET in the deferred category

CUI's argument here is three-fold: (1) it was wrongly placed in the deferred **category**; (2) CET was rightly deferred; and (3) if **CUI** had not been wrongly deferred it would have been awarded funding for all five counties*

The fallacy in **CUI's** argument is that even if it was wrongly deferred and CET was rightly so, CUI would still not have been awarded funding for all five counties. The selection decision was made in September 1981 before the issue of deferrals arose in October 1981 and once the deferrals were lifted, that same selection decision was followed. Secondly, **CUI's** argument is based on a policy that did not actually exist. This "policy" allegedly provided that in any case where two applicants were competing for the same territory and one organization was deferred and the other was not, the nondeferred applicant would receive the funding for those areas. See **CUI's** brief, pages 35, 36.

3/ CUI has also alleged that the Grant Officer and **OFREP** unfairly relied on the fact that if CET was not chosen for certain 'counties it would have to close skills centers which were heavily capitalized and so would result in a loss to the government and higher start-up costs for CUI. (TR 44, Testimony of Daniel Cox) However, Mr. Cox testified that this was not a primary factor in **OFREP's** recommendation (TR 44) but in fact was a very minor consideration. (TR 70) In view of this testimony and of the fact that the major considerations were reasonable, there is no need to decide if capitalization was also a reasonable consideration.

As CUI correctly noted in its brief, there was only one instance in which this "policy" could even have been applied. There, Proteus Adult Training, Inc. was an incumbent grantee which applied for funding for Fiscal Year 1982 for several counties, including Kern County, and which received a panel score of 60. (TR 178, Stipulation) The County of Kern, a new applicant, applied for funding for only Kern County and was awarded a panel score of 62. Id. In September 1981, the County of Kern was **recommended for** funding for Kern County and Proteus for all the other counties for which it had applied except Kern. Id. Proteus was placed in the deferred category in October 1981 and the County of Kern was selected for funding in Kern County at the same time. (DOL #1, Tab M) Mr. Adams testified that the recommendation for funding **of Kern County** was made before the deferral issue arose and that the award to the County of Kern was based on three factors: (1) the County of Kern scored two points higher than Proteus; (2) Proteus had previously had difficulty establishing linkages and coordination of services in Kern County; and (3) there was no audit information on the County of Kern since it was a new applicant and it had scored well in the competitive process. (TR 273) The recommendation was followed by **OFREP** and the Grant Officer. Since that selection was made even before the deferral issue arose, any so-called policy regarding deferrals could not have influenced the Kern County decision. 4/

Furthermore, OFREP officials testified that there was no such policy in existence anyway. Both Mr. Campbell and Margaret Crosby testified that there was no policy to award funding to a no&deferred organization over a deferred one in contested counties. (TR 201, Testimony of Lindsay Campbell; TR 233, Testimony of Margaret Crosby) Thus, since neither the facts nor the testimony supports **CUI's** allegation that such a policy existed, **CUI's** argument cannot be given any **credence--regardless** of whether the deferrals of **CUI** and CET were proper.

In any event, I find the deferrals of both CUI and CET did not involve an abuse of discretion and were not arbitrary and capricious. **All the** deferrals were apparently the result of a change in policies by a new administration, the intent of

4/ That the County of Kern was selected over Proteus despite the fact that Proteus, as the incumbent, had incurred capitalization costs in Kern County indicates that the capitalization issue was indeed only a minor consideration in the selection process. See, supra footnote 3, at 15.

which was to insure that all organizations had sound management procedures. The deferral decisions were made by Department of Labor officials outside of **OFREP** and the grants office. (TR 236, Testimony of Margaret Crosby) With that understanding as the basis for review, it was certainly not error to defer either CUI or CET even if officials in **OFREP** were personally against those deferrals. See e.g. TR 84, Testimony of Daniel Cox; TR 200, Testimony of Lindsay Campbell.

'As to **CUI's** deferral, it is true that the deferral was the result of findings made in a 1976 audit report (DOL #1, Tab F) and that **CUI's** designation for funding was previously deferred in Fiscal Year 1977 because of those same findings. (CUI #10; TR 706, Testimony of Avanteos Ramirez) It is also true that CUI had fully resolved the disallowed costs which resulted from that audit report prior to the deferral designation in October 1981. (The matter was finally resolved around September 28, 1981 with **CUI's** final payment of the disallowed costs agreed to pursuant to a settlement agreement. CUI #11, 12) However, Mr. Kavinsky testified that payment of questioned costs would not necessarily resolve the problem since payment would not mean that the system had been corrected or that steps were being taken to prevent a recurrence of the same problems. (TR 144; DOL #1, Tab F) This view was reasonable particularly since the specific allegations, which involved loss of wages for board members and a series of loans and advances to board members, were of a very serious nature--especially to higher-ranking officials who were without direct knowledge of **CUI's** organization, unlike the **OFREP** staff. That the deferral and its resulting review were reasonable is also proven by the fact that although CUI "passed" the management compliance review, it was in the future to be monitored closely by the Department of Labor since it was not rated above a three in any reviewed category. (DOL #1, Tab J)

CET's deferral was **reasonable** although there is not any proof in the record that the charges against it were serious enough to result in a denial of funding altogether or a termination of then-current funding as CUI alleges. **CET's** deferral was also related to audit problems, although unlike CUI, costs questioned in its audit had not been resolved at the time of its deferral. See TR 72, Testimony of Daniel Cox. **Additional** problems were **apparently** uncovered by the firm which conducted the management compliance review on CET. (DOL #1, Tab K) Those problems concerned related-party transactions which specifically involved the establishment of wholly owned subsidiaries of CET to purchase real property and equipment for leaseback to CET. Id. It is these additional problems which CUI alleges were

serious enough to result in a suspension or termination of funding to CET. ^{5/} These problems were, however, resolved to the Department's satisfaction. (TR 244, Testimony of Margaret Crosby) The firm which conducted the management compliance review on CET, while it noted these problems, still found CET to be in compliance with existing contracts and the related federal regulations. (DOL #1, Tab K, pages, 1, 5) The firm also noted that the Department had approved these transactions. Id. at pages 20, 75.

Upon reviewing the evidence, I conclude the deferrals of both CUI and CET were reasonable. Thus, even if a policy of preferring a non-deferred applicant over a deferred one did exist, it would not have aided CUI.

- (d) The Grant Officer's decision to select CUI for funding in Imperial and Riverside Counties and CET in San Diego, San Bernardino and Orange Counties was not arbitrary and capricious, or an abuse of discretion, and did not lack a rational basis.

More specifically, under the standard of review for procurement cases set out in Kinnett Dairies, supra, page 11, the Grant Officer's decisions for Fiscal Year 1982 did involve matters committed primarily to his own discretion and did show a rational basis and, secondly, the procurement procedures did not involve a clear and prejudicial violation of applicable statutes or regulations.

Beyond certain basic requirements, neither the statute nor the regulations or the "Handbook for Section 303 Grant Process" is explicit in setting out the considerations and other factors which should affect the Grant Officer's selection decisions. A great deal of discretion is inherent in the grant procurement process anyway. Thus, the Grant Officer's selection decisions were committed primarily to his own discretion. And the Grant Officer's decisions, in terms of the factors he considered in selecting grantees and of the final decisions themselves, reflect a rational basis. The consideration of the character of the five five counties and the nature and history of CUI and CET were in keeping with the regulations and the Handbook. His specific findings with regard to each are also supported by substantial evidence.

5/ Whether CET's funding should have been suspended or terminated, however, is not an issue in this proceeding.

By the same token, the procurement procedure followed here did not violate any applicable statutes or regulations. CETA and its regulations are vague as to the specific requirements of the procurement process. While the Handbook is more detailed, it too allows the Grant Officer a good deal of discretion after following certain basic requirements. The consideration of the character of the counties and the nature and history of these organizations falls within the Handbook guidelines. There was simply no violation of any procurement laws and the consideration of these other factors in no way prejudiced either CET or **CUI**. Such considerations certainly aided both with regard to the scoring of their respective proposals since the panel's scoring methods were questionable, although not irrational, and since the scores were so close under any scoring method.

As to the deferral decisions, the regulations specifically authorize the Department to defer designation of any organization. 20 **C.F.R. § 689.206-1(c)(2)**. Thus, the deferral did not violate CETA or its regulations or the Handbook. There **was** also substantial evidence to support the Department's decision to place CUI and **CET** in the deferred category until a management compliance review was conducted. Thus, there was a rational basis for these deferrals.

In conclusion, the decision of the Grant Officer to select **CUI** for funding in Imperial and Riverside Counties and CET for Orange, San Diego and San Bernardino Counties for Fiscal Year 1982 is affirmed.

III

The Fiscal Year 1984 JTPA Selection Process

Section 402 of JTPA directs the Secretary of Labor to establish administrative procedures and machinery for the selection, administration, monitoring and evaluation of migrant and seasonal employment and training programs. 29 U.S.C. § 1672(b):

Section 402 further permits the Secretary to award grants or contracts to public agencies and private non-profit **organiza-**tions so that they may provide services to migrant and seasonal farmworkers. 29 **U.S.C. § 1672(c)(1)**. Such organizations are to be ones which the Secretary has determined have "an understanding of the problems of migrant and seasonal farmworkers, a familiarity with the area to be served, and a previously demonstrated capability to administer effectively a diversified employability development program" for these workers. Id. It was pursuant to these **pro-**visions that the "**Solicitation for Grant Application**" (SGA) was developed and published in the Federal Register on May 27, 1983.

48 F.R. 23932 et seq. The SGA establishes three basic requirements which **must** be met before an organization may be awarded funding pursuant to Section 402. The first requirement is that an applicant meet the Precondition for Grant Application. 48 F.R. 23933. Secondly, a potential grantee's application must be reviewed by a competitive review panel in order to determine if the applicant meets the **criteria** of Section 402(c) (1). 48 F.R. 23936. Finally, an applicant must pass a Responsibility Review before it can be finally selected as a **potential** grantee. 48 F.R. 23933. It is the competitive review panel process that is at issue in this case.

Section 402 of JTPA specifically provides that in awarding any contract or grant for migrant and seasonal farmworker **programs**, the Secretary "shall use procedures consistent with standard competitive Government procurement policies." 29 U.S.C. § 402(c)(1). Pursuant to this provision, the Secretary established a competitive review panel, which consisted of three members from the Employment and Training Administration, only one of whom had any knowledge or experience with migrant and seasonal farmworker programs (and no present responsibilities to CUI or **CET**), to review and **rate all** funding applications. The "Solicitation for Grant Application Proposal Review Panel, **Instructions**" sets out the procedures to be followed in rating each application.

The panel instructions provide that the panel's evaluation of proposals must be conducted by the rules specified in the SGA and by those criteria **only..** (DOL #2, Tab E) These instructions also state that it "is unfair to judge a competitor by criteria which did not appear in the **SGA.**" Id at page 5.

Panel members were provided with forms on which to record each's individual ratings and a form showing the past performance of each current grantee. The chairperson of the panel also composed a Chairperson's Summary Sheet and a list of each applicant's strengths and weaknesses.

The panel read and reviewed three applications each day and met every two or three days to discuss their findings. At such meetings, panel members would change their scores in response to comments of other members. A composite score for each applicant, based on an averaging of the individual ratings, was reached. The panel gave CUI a score of 88 and CET a 96. (DOL #2, Tab C)

The Grant Officer decided to make his funding decisions solely on the basis of which competitor received a higher score with the exception that an incumbent grantee (one currently receiving a CETA Section 303 grant) would be given the award if its

score was within three points of its higher scoring competitor. On this basis, CET was awarded funding for all five of the contested counties over CUI because of its higher score (above the three-point range).

(a) The panel did not waive certain format and content requirements of the SGA.

CUI cites two violations of the format and content requirements of the SGA. The first concerns the panel's reading of the resumes attached to **CET's** proposal. The second involves the panel's reading past the first 75 pages of a proposal.

The SGA specifies that "[e]xclusive of eligibility documentation and letters of support and commitment, the funding application should not exceed 75 pages of double-spaced **unreduced** type." 48 F.R. 23935. Eligibility documentation is defined as (1) a statement indicating the legally constituted authority of the organization and (2) the employer identification number from the Internal Revenue Service and proof of tax-exempt status from non-profit applicants.

Resumes are not specifically listed as an-acceptable attachment. They are not prohibited either. Furthermore, the SGA does require an **administrative** and staffing section in the proposals and specifies that one of the ratings criteria includes administrative capability. 48 F.R. 23935, 36. The rating of administrative capability involves consideration of the applicant's management experience and efficiency and of the managerial expertise of the organization's present and proposed staff in managerial and decisionmaking positions. 48 F.R. 23936. Thus, the panel's consideration of the qualifications of the applicants' staffs was valid. The SGA simply did not specify how the staff's managerial experience and expertise were to be presented. CET did so through the submission of resumes. On the other hand, CUI gave very little **detail on** the qualifications of its staff other than stating that the staff members have farmworker back-

contain reference to staff qualifications or lack of demonstration thereof by at least one panel member and usually by all three. Id. 6/

Both panel members Brenda Hamlin and William Delaney testified that while information or a description of the qualifications of key staff was very helpful, resumes were only one way to provide this information. (TR 561, Testimony of Brenda Hamlin; TR 534, Testimony of William Delaney) In fact, Ms. Hamlin testified that

[I]t was very helpful to me as a panel member and a new panel member to see a good description of the staff, the key staff members, and whether or not you call that good description a resume or just a fully detailed description, it makes no difference to me, but I needed some meat to that proposal in order to tell more about the people that were going to run the show.

(TR 561)

It is clear, then, that CUI was not harmed per se by CET's inclusion of resumes. Instead, it was hurt by its own failure to provide much substantive information on the qualifications of its own staff through even just a written description and not necessarily through resumes. The fact that the SGA did not specifically provide that organizations could submit resumes does not mean they could not, particularly since the SGA did note that the administrative capability rating would include consideration of staff experience and expertise. 7/

As for the **75-page** limitation, CET's proposal itself was only 66 pages long. (CUI #6) Admittedly, the inclusion of the resumes in that page total means that CET's proposal exceeded 75 pages just by virtue of the number of pages the resumes encompass. Also, the resumes are in single-space type. Thus, in terms of double-spaced pages, the inclusion of the resumes would add an additional 30 pages to CET's proposal--well beyond the **75-page** limitation.

6/ Maharlika Management Corporation also apparently submitted resumes. See CUI #7, rating forms on Maharlika.

7/ It should be noted that CUI also included attachments to its proposal which were not specifically authorized by the SGA, articles of corporation and bylaws. (DOL #2, Tab 0)

But this supposed violation does not prejudice CUI since CUI's proposal also is longer than 75 pages when non-required attachments are added and, more importantly, since the 75-page limitation was not mandatory. The SGA merely provides that the funding application "should not" exceed 75 pages. All three panel members testified that they were informed that the 75-page limitation was only a guide. For example, Mr. Delaney testified that he thought the 75-page limitation was discretionary and that he was permitted to read beyond that number. (TR 407) Also, all three members were consistent in reading beyond 75 pages except in one instance by Mr. Milici where the proposal was very long and single-spaced in parts. (TR 642, 651)

The panel instructions required the panel members to make a fair and objective evaluation of each proposal and noted that it was essential that there be consistency in the review process. (DOL #2, Tab E, pages 5 and 8) The panel clearly followed these instructions with regard to resumes and the 75-page limitation. Except in one case, all proposals were read in their entirety. All proposals were also rated as to the experience and expertise of the staffs. This consistency in treatment alleviates any problem that may be presented by CET's inclusion of resumes and the panel's review of proposals longer than 75 pages, particularly where neither is a violation of the SGA. It perhaps would have been fairer to all applicants, and particularly to those who abided by that limitation, to strictly follow the 75-page limitation since it was noted in the SGA. Generally speaking, one organization should not be penalized by following such a limitation while another is rewarded. But in this case, I cannot say that CUI was irreparably harmed thereby. The 75-page limitation of the SGA is not stated in mandatory terms and if CUI was confused about its meaning, it could have questioned the Department of Labor on this point. Also, the important fact is that all applicants were treated equally and the problem arose for CUI not because CET submitted resumes but because CUI failed to include a suitable description of the qualifications of its own staff.

(b) Panel member Milici's error with regard to CUI's use of on-site visits.

Panel member Carmelo Milici stated in his rating of CUI's administrative capability that the evaluation system relies completely on review of documentation with no mention of on-site visits. (DOL #2, Tab C)

In fact, it is clearly stated in CUI's proposal that its monitoring system includes on-site visits (in addition to a review of documentation). (DOL #2, Tab 0, pages 11, 12)

Mr. Milici admitted during the course of his testimony that it was an error on his part to say that **CUI's** proposal made no mention of on-site visits. (TR 666)

In all likelihood Mr. Milici's misperception affected his scoring of **CUI's** proposal. The fact that he noted a problem with the monitoring system as a weakness of **CUI's** proposal indicates as much. I cannot find, however, that CUI was prejudiced by this error. For even if Mr. Milici had realized that **CUI's** monitoring system included on-site visits and had then given CUI a perfect score on the administrative capability section, only an additional two points, or three at most, would have been added to **CUI's** composite score of 88. And CUI would still have lost to CET.

(c) The panel's reliance on the 15 percent deviation rule.

The rating for criteria "B," program experience, is divided into two categories. For the first subfactor, performance, the panel members were to compare the 'planned versus actual performance for the applicant's previous program' with the highest rating awarded to **applicants** who 'met or exceeded their planned performance levels.' 48 F.R. 23936.

The panel members were given a form entitled "Worksheet for Question C. 7" on all incumbent grantees in order to making this rating. (TR 690, Testimony of Carmelo Milici)

There is no question that this form was prepared by the government authorized representative (GAR) of each incumbent grantee for purposes of the responsibility review portion of the grant selection process. (TR 328, 339, Testimony of Cleofun Adams) Specifically, the worksheet was used by the **GAR's** to determine if there was substantial failure to provide services by incumbent grantees. Id. The worksheet defines substantial failure as planned **versus** actual deviation of more than 15 percent in at least one-half of the performance categories. (DOL #2, Tab B)

In rating the performance subfactor of criteria B, panel members Milici and Hamlin followed the 15 percent deviation "rule." Mr. Delaney initially did not.

Mr. Delaney testified that **CET's** proposal was the first he reviewed which contained the worksheet. (TR 373) He gave CET a score of 20 for program experience because **CET's** performance in all categories but one was negative (as compared to its plan) for Fiscal Year 1983. After discussing his rating

with the other panel members, Mr. Delaney changed his score to a 28. (TR 377) He did so pursuant to Mr. Milici's explanation that performance was to be measured under the 15 percent deviation rule. (TR 374, 375) Under the 15 percent rule CET was deficient in only one of its performance categories for Fiscal Year 1983 and not **five of** six as it would be otherwise.

CUI alleges that it was improper for the panel members to follow the 15 percent deviation rule because that rule applied to the responsibility review only. (CUI's brief, pages 26, 27) CUI argues that any failure, however slight, to meet performance goals should result in a lower score to an incumbent grantee.

The SGA does not specifically authorize use of the 15 percent deviation rule to determine program performance. It does not prohibit its use either. 48 F.R. 23936. Neither the panel instructions nor the program experience individual panel rating sheet mentions the 15 percent deviation rule. As with the SGA, the individual panel rating form for program experience only states that the highest score will be awarded to applicants who have "met or exceeded" their planned performance levels. Without other information, the likely interpretation of "met or exceeded" would be that the actual performance was equivalent to the planned performance. A 15 percent or even a 10 or 5 percent negative deviation is not implied from this language. On its face, then, Mr. Delaney's first interpretation was more reasonable. However, other factors must be taken into consideration*

First, the worksheet itself does discuss the 15 percent rule. But the 15 percent rule is defined not in terms of whether an incumbent grantee met **or** exceeded program levels but rather whether there was a substantial failure by the grantee to provide services. Application of the 15 percent rule makes more sense when used in this manner. However, common sense should also enter into the decision. Obviously, it would be ridiculous to award a low score to an incumbent grantee which fails to meet its performance goals by only one percent. Thus, I cannot find it was unreasonable for the panel members to rely on the 15 percent deviation rule. This is particularly so since the Division of Farmworker and Rural Employment Programs relied on the 15 percent deviation rule, and had done so for 10 or 12 years, in order to determine if an organization's performance was satisfactory. (TR 333, Testimony of Cleofun Adams) Use of this standard was clearly known to Mr. Milici since he was a member of that division and he so testified. (TR 634) That he imparted that knowledge to the other panel members was not error since as the panel member with knowledge of migrant and seasonal farmworker programs it was reasonable for him to explain commonly understood aspects of the program.

Secondly, while the use of the 15 percent deviation rule clearly aided CET with regard to its performance goals for Fiscal Year 1983, its use also helped CUI in determining its performance for Fiscal Year 1982 for **in Fiscal Year 1982**, CUI had a negative deviation in four of its eight performance categories. (DOL #2, Tab B) Albeit, three of those four negative deviations were for only two percent each. This minor discrepancy symbolizes, however, the problems of defining "met or exceeded" as including any deviation whatsoever.

This example leads to a second area of questionable interpretation, which is the definition of "previous program"--the year for which planned versus actual performance is to be compared pursuant to the SGA. It is not clear from either the testimony of the panel members or a review of their individual panel rating sheets whether each or all panel members defined previous program as Fiscal Year 1982 or 1983 or both. Both sets of numbers appear on the worksheet. Previous is generally defined as coming before another such one. Fiscal Year 1983 was the current program year at the time of the panel process. It would be reasonable, then, to define the previous program **as the** one for Fiscal Year 1982. In **such** case, CET has **met or** exceeded its performance goals in all six categories but CUI did not in four of the eight categories if the 15 percent standard is not used. The result is that **CUI's** score, and not that of CET, is inflated.

Because the SGA and panel instructions were not as clear as they could have been for these matters, the important factors for consideration are (1) not whether the panel picked the best possible interpretation but rather whether the interpretations they did make were reasonable and (2) whether the panel treated all applicants equally and fairly. Clearly, the panel's decisions to use the 15 percent deviation rule and to follow either or both Fiscal Years 1982 and 1983 performance levels were reasonable for the above-discussed reasons. Secondly, there is no evidence whatsoever that the panel applied different interpre-

Panel member Hamlin testified at the hearing that she thought delivery agents were necessary. (TR 576) She also testified that in reading **CUI's** proposal it was not clear to her who **CUI's** delivery agents would be. Id,

On the other **hand**, both panel members Delaney and Milici understood that delivery agents were not required. However, both expressed confusion as to whether CUI would in fact use delivery agents. (TR 505, Testimony of William Delaney: TR 668-671, Testimony of **Carmelo** Milici) The basis for Mr. Delaney's confusion is, at least in part, because of **CUI's** statement in its proposal, under the delivery agent provision, that its strategy was to work closely with local prime sponsors and others. (TR 506) Mr. Milici testified that while CUI stated it would have no subcontractors, it also spoke of having "English as a Second Language" courses which Mr. Milici said require other agencies. (TR 671) And on his individual panel rating sheet, Mr. Milici noted that CUI plans to teach one skill through various vocational schools.

CUI's proposal does in fact state that it will operate the applied for grant directly without subcontractors and that it will be the only delivery agent. (**DOL #2**, Tab D, page 68)

Despite this language, panel members Milici and Delaney testified they were confused because of other contradictory statements in **CUI's** application which indicated the use of subcontractors. This confusion is also indicated by a statement in the Chairperson's Summary Sheet and the list of strengths and **weaknesses**.

I find these other statements in the proposal could have confused the panel members as to whether CUI would in fact have delivery agents. The proposal does also speak of English as a Second Language classes and on-the-job training programs as well--both of which clearly require subcontractors. Since the confusion was reasonable, any deduction of points for this

(DOL #2, Tab C) Furthermore, in his own comments for this section on his individual panel rating sheet, panel member Milici comments that "[N]arrative is difficult to read in many places. [T]here are long run on sentences and the syntax leaves much to be desired." Id. Panel member Delaney also commented that "narrative [is] confused. Id.

Because of these comments CUI alleges that the panel discriminated against CUI because of its writing style since **CUI's** proposal was written by persons for which English is a second language. (**CUI's** brief, page 33)

CUI argues that the substance of the proposal, not the writing style, should have been the primary focus of the panel. Since writing style is not in any way related to the ability to provide Section 402 JTPA services to migrant and seasonal farmworkers, CUI is correct.

But CUI has not proven that writing style was impermissably considered. The two panel members who were questioned on this subject at the hearing both denied considering the writing style of a proposal, Mer se, in rating a proposal. Id. Id. testified that she **focused on** the substance of "the proposals." (TR 559) Mr. Delaney testified that

If **write well** means style rather than the presentation of facts, I did not take [that into consideration]. But the presentation of facts, by which I mean imperfect narrative, we did take that into account.

I didn't penalize CUI for not writing well.

(TR 489) Mr. Delaney also testified that he made allowances for proposals written by persons whose native language was not English. (TR 491, 509)

It is clear from the testimony that the panel did focus on the substance of the proposals and not on the writing style per se. The panel was concerned with whether all the necessary **information** was written into a proposal, that is, whether it was "leaky" or missing some information, and not whether perfect grammar was used. I find this to be so despite the comments by Mr. Milici that did go more towards grammar. The panel as a whole was concerned with substance. That writing style was not listed as a weakness of **CUI's** proposal further proves that writing style was not impermissably considered, and even assuming it was considered somewhat, it was not a primary consideration.

- (f) CUI should not have been given three bonus points as an incumbent

Grant Officer Edward **Tomchick** testified that in order to decide to which organizations to award funding, only the panel scores were considered (for those organizations **which** had passed the responsibility review). (TR 522) Thus, in the situation where two applicants were competing for funds for the same territory, the higher scorer was awarded those areas unless the incumbent grantee's score was within three points of the higher scoring non-incumbent, in which case the incumbent was awarded funding. (TR 522, 534) The rationale behind this "rule" was that three points **was** a competitive range where in such an instance the proposals are so close it is very difficult to choose between them so other factors, such as incumbency, should be considered. (TR 534)

The Grant Officer noted that **CUI** was the incumbent in Imperial and Riverside Counties. The three "bonus" points were not awarded to **CUI** in determining to which organization to award **funding** for these counties for Fiscal Year 1984-i however, since **CUI's** final score of 88 was not within three points of the competitor **CET's** score of 96. (TR 529)

CUI does not allege that the use of scores only or the use of the three-point rule violated procurement law. Rather, CUI argues that it **was** wrongly **denied** incumbent status in three other counties because of the Grant Officer's error in not selecting CUI for funding in Fiscal Year 1982 under CETA. But **I** have already upheld the Grant Officer's decision for Fiscal Year 1982. Thus, CUI was not wrongly denied incumbent status in Fiscal Year 1984 and, in any event, even if **CUI** was wrongly denied, it still would not have received the funding in Fiscal Year 1984 since its score was lower than **CET's** scores and not within the three-point bonus range.

- (g) The Grant Officer's decision to not select CUI for funding in Fiscal Year 1984 under JTPA was not arbitrary and capricious, or an abuse of discretion, and did not lack a rational basis.

More specifically, there was not a clear and prejudicial violation of the requirements governing the competitions, and secondly, the Grant Officer's decisions basically concerned matters committed to his own discretion and those decisions had a rational basis. See Kinnett Daries, Inc., supra, page 11.

The SGA and the "Solicitation for Grant Application Proposal Review Panel Instructions" did set out certain requirements for the competitive review process. Not all of those requirements were clearly defined. For example, the standard for comparing planned versus actual performance for incumbent grantees could have been defined so it would have been absolutely clear whether the 15 percent deviation rule should have been followed; But the interpretations the panel followed for this requirement and all the other areas questioned by CUI were reasonable and were not in fact clear violations of any requirements. The panel did not do anything which was prohibited. Any violations of the requirements, such as Ms. Hamlin's mistaken belief that delivery agents were required, were of a de minimus nature. And procedural error alone is **insufficient to** overturn the Grant Officer's decision unless that procedural error prejudiced CUI and affected the substantive result--in this case, the grant award. See Kentron Hawaii Limited, supra, page 11. Here, the only **actual errors** were Mr. Milici's mistaken belief that **CUI's** proposal did not mention on-site visits and Ms. Hamlin's inaccurate perception that CUI was required to have delivery agents. And only Ms. Hamlin's mistake was an actual incorrect interpretation of the requirements of the procurement process. While these errors may have indeed affected their scoring of **CUI's** proposal, the scoring difference would not be enough to change the funding awarded to **CET**. CUI was simply not prejudiced by the panel's scoring when all is considered. **Thus, I** find there was no clear and prejudicial violation of the requirements governing this competition.

Secondly, within the broad parameters set out in the SGA and the panel instructions, the Grant Officer, and through him, the panel, had a great deal of discretion in rating these proposals. For example, since the SGA did not make the **75-page** limitation mandatory, it was within the discretion of the Grant Officer to decide whether it should **be** strictly followed anyway. The same is true with regard to the attachment of materials in addition to those specified in the SGA. The use of the 15 percent deviation rule is another example since the SGA did **not** specify the criteria for determining performance. There was a rational basis for each of these decisions and for the panel's confusion as to **CUI's** use of delivery agents as well. Substantial evidence in favor of each decision has been shown. Furthermore, neither bias nor undue influence has been proven by CUI. Instead, the evidence clearly shows that the panel treated all applicants fairly and equally.

Conclusion

The decision to only partially select CUI for funding in Fiscal Year 1982 under the Section 303 'CETA program and the decision to not select CUI for funding at all for Fiscal Year 1984 under Section 402 of JTPA are upheld. There is substantial evidence to support each decision and neither was arbitrary or capricious, an abuse of discretion or showed a lack of rational basis. It is clear that, in each case, CUI was treated fairly and equally with CET and all other applicants. CUI has simply not met its burden in proving otherwise.

ORDER

The decision of the Grant Officer to only partially select CUI for funding in Fiscal Year 1982, at issue in case number 82 -CPA-22, is hereby AFFIRMED.

The decision of the Grant Officer in not selecting CUI for funding for Fiscal Year 1984, at issue in case number 83-JTP-3, is also hereby AFFIRMED.



E. EARL THOMAS

Deputy Chief Judge

Dated: 14 SEP 1984
Washington, D. C.

EET/PCW/tt

. SERVICE SHEET

Case No. 83-JTP-3 and 82-CPA-22

Case Name: Campesinos Unidos, Inc.

A copy of the foregoing was sent to the following individuals:

Peter A. Greene
Thompson, Hine and **Flory**
1920 N Street, **N. W.**
Washington, D. **C.** 20036

Adalberto Ramierz
Executive Director
Campesinos Unidos, Inc.
Post Office Box 203
1005 C Street
Brawley, California 92227

Joseph T. Paslawski
Deputy to the Special Counsel
U. S. Department of Labor, ETA
601 D Street, N. W.
Washington, D. C. 20213

Edward **Tomchick**
Grant Officer
U. S. Department of Labor/ETA
601 D Street, N. W.
Washington, D. C. 20213

Associate Solicitor for Employment
and Training
Attn: Frank Buckley
U. **S.** Department of Labor
Room N **2101**
200 Constitution Ave., N. W.
Washington, D. C. 20210

James Feldesman
Boasberg, Klores, Feldesman &
Tucker
Attorneys at Law
2101 L Street, N. W.
Washington, D. C. 20037