

U.S. Department of Labor

**Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109**



In the **Matter of;**

State of **Maine**

v.

U.S. Department of Labor

Case No. 84-JTP-2

Appearances:

Pamela **W.** Waite, Esq.
For the State of Maine

Chester A. Hurwitz, Esq.
For the Department of Labor

Kathleen **O'Neil**, Esq.
submitted an amicus curiae brief
on behalf of Penobscot Consortium

Before: Chester Shatz
Administrative Law Judge

DECISION AND ORDER

E-ALJ-000328

This case, arising under the Job Training Partnership Act (hereinafter "the Act"), 29 **U.S.C. 1501-1781**, Pub. L. 97-300, 96 Stat. 1324, concerns a protest by the State of Maine (through its Department of Labor, and thus hereafter referred to as **MDOL**) against the award of a grant to Penobscot Consortium (hereafter "Penobscot"). MDOL contends that it should have been awarded the grant instead of Penobscot, and that the grant **to** Penobscot issued by the Grant Officer was illegal and improper under provisions of the Act. It therefore **requests** that the grant be set aside and that the Grant Officer be ordered to award the grant to MDOL.

After exhausting all its administrative appeals at the lower levels of the Department, MDOL requested a hearing before an administrative law judge pursuant to 20 C.F.R. 633.205(e) and 20 C.F.R. 636 et seq., and a hearing was held before me on January **17, 1984 at Boston, Massachusetts** at which both the State of Maine and the Grant Officer of the Department of Labor were ably represented by counsel. Penobscot did not make a timely request to participate at the evidentiary hearing, but nonetheless was

given permission by me to file an **amicus** brief; briefs have been received from MDOL, the Grant Officer and Penobscot, and the record was closed on May 18, 1984.

The following references will be used herein: Tr for transcript, Maine X for **MDOL's** exhibit and DOL X for the Grant Officer's exhibit. For reasons below, I find that there is no **basis** in the record to support the Grant Officer's awarding of the grant to Penobscot.

Findings of Fact

The Act

1. The Job Training Partnership Act was signed into law on October 13, 1982, to replace the Comprehensive Employment and Training Act (**CETA**), 29 **U.S.C.** 801-992, and was designed to provide job training to youths, unskilled adults, economically disadvantaged individuals and others facing serious barriers to employment. The Act did not become effective until October 1, 1983. Title IV of the Act includes provisions for job training, employment opportunities and for other services for those individuals who suffer chronic seasonal unemployment and underemployment in the agriculture industry. See Section 402 of the Act and also 20 C.F.R. **§633.102** et seq., 48 Fed. Register 48744 et seq. It should be noted here that Penobscot had **previously** been designated as **the Migrant** and Seasonal Farmworker grantee under the CETA program. That program was a federally administered program under CETA, and remains a federally administered program under the new Act. Section 402 **(c)(1)** of the new Act concerns, in part, the award of grants and contracts by the Department of Labor in connection with providing services to meet employment and training needs of **migrant** and seasonal farmworkers, and contains the following provisions:

In awarding **any** grant or contract for services under this section, the Secretary shall use procedures consistent with standard competitive Government procurement policies. (emphasis added)

The Solicitation For Grant Application and Subsequent Events

2. On May 27, 1983 the Department published in the Federal Register (48 Fed. **Register** 23932) a Solicitation For Grant Application (**SGA**) concerning the Migrant and Seasonal Farmworker (**MSFW**) program under the new Act for fiscal year 1984. Both the Department and the Solicitation contemplated that separate grants would be awarded for each state involved in the program, based on

proposals received from applicants (sometimes hereafter referred to as "offerors") for each particular state involved. Only MDOL and Penobscot submitted proposals for the MSFW grant that was to be awarded for the state of Maine.

3. Before **discussing** the evaluation of the two proposals received for the state of Maine and subsequent award of the grant for that state, I note that the SGA clearly indicated that proposals received would be competitively rated based on the following criteria:

- (1) **Administrative Capability**-Range, 0 to 40 points.
- (2) Program Approach-Range, 0 to 30 points'.
- (3) Program Approach and Delivery System-Range, 0 to 20 points.
- (4) Linkage and Coordination-Range, 0 to 10 points.

Thus applicant6 submitting proposals could reasonably conclude that award would be made to the applicant receiving the highest score, especially in view of the mandate contained in Section 402 of the Act that the grant award procedure be "consistent with standard competitive government procurement policies".

4. After receipt of **proposals**, the Department of Labor convened 2 **seperate** 3-member panels to review and rate all proposals received (one 3-member panel reviewed the proposals relating to the western states and the other panel reviewed the proposals relating to the eastern states. Tr 17). The panels were instructed to rate the proposals solely on the criteria set forth in the SGA mentioned above (Tr 11, 15-16). With regard to the proposals of MDOL and Penobscot, the panel member6 held some **meetings and** ultimately **scored** the two proposals as follows:

MDOL	86.6
Penobscot	84.3

Thus, **MDOL's** score was **2.3** points higher than **Penobscot's**.

5. After the panels submitted their **scoresheets** to the Grant Officer for all the states, the Grant Officer held a meeting to review the scores with representatives of the Program Office 60 that it could be determined who would receive grants for each of the states involved under the program. At the start of the meeting and before the panel-scoring of the individual proposals were reviewed by the participants at the meeting, the Grant Officer adopted the oral suggestion of the Acting Director of the Program Officer that grant award should be made to the

applicant receiving the highest score for each state involved except in those instances where an applicant was the incumbent CETA grantee and its score was within 3 points of the highest score. In that event, it was decided that the incumbent grantee should be awarded the grant in order to avoid any start-up costs and a possible disruption of services to those persons that were to be covered under Title IV of the Act. Apparently the Grant Officer and the Acting Program Director were of the view that there would be significant start-up costs and disruption of services if the grant were to be awarded to an applicant other than an incumbent CETA grantee. (See Tr **20-21**, 45, and 52).

6. Because Penobscot's score was less than 3 points lower than **MDOL's** score, it was tentatively decided to award the grant to Penobscot since it was the incumbent CETA grantee. However, whereas **MDOL's** proposal indicated it would operate a statewide program, Penobscot's proposal did not indicate that it contemplated operating a statewide program. The Acting Program Director expressed concern over Penobscot's area of coverage because the Program Office was interested in expanding coverage (**TR 23-34**). Thus, it was decided to contact Penobscot in an effort to determine whether or not it would be willing to expand its area of coverage (Tr. **25**), and after being so contacted, Penobscot expressed a willingness to expand its program coverage (Tr. 28, 33, 52, 54). Testimony reveals that such expansion of coverage would involve some start-up costs (Tr. 41 and 58). MDOL was never contacted prior to award of the grant to Penobscot in an effort to determine what start-up costs, if any, or disruption of services, if any, would **be** involved if it were awarded the grant.

7. The competition for the grant concerning the state of Maine was the only instance nationwide where the award *was* not made to an offeror receiving the highest panel score. It appears that with reference to the competition in the other states involved under the program, the incumbent CETA grantee in all instances either received the highest score or received a score which was more than 3 points lower than the highest score (Tr. **27, 43**). MDOL **did not** learn that it had received a higher score than Penobscot until a few months after grant award. (See DOL X **1**, Tab **C**).

8. Penobscot was awarded the MSFW grant for the state of Maine for 2 years commencing October 1, 1983. The record does not contain evidence indicating whether Penobscot ever expanded its area of coverage to include counties other than those it serviced under the CETA program, and if it did expand its area of coverage, whether it incurred start-up costs.

9. MDOL has followed all of the administrative regulations in a timely manner in perfecting its appeal.

Additional Findings of Fact, Discussion and Conclusions of Law

It appears from the record that in awarding the grant to Penobscot, the Grant Officer did not follow procedures **consistent with standard competitive government procurement policies" as required by Section 402(c)(1) of the Act. It is noted that the SGA did not indicate that incumbent CETA grantees would be awarded the grant if its score was within 3 points of the highest score. Moreover, nowhere in the SGA is reference specifically made that either so-called "start-up **costs**" Or consideration⁶ based on possible disruption of services would be factor⁶ in the scoring of proposals or would be considered significant factors in determining who was to be the grantee.

The Grant Officer, contends, that his procedure in choosing a grantee was proper. In this regard, he calls attention to the Department's published procurement regulations in 41 C.F.R. chapter 29. He argue⁶ that these regulations permit the establishing of a competitive range for proposals received, and that award can properly be made to any offeror whose proposal falls within the competitive range provided the proposal offers the greatest advantage to the Government, cost or price, **technical** and other factors considered. In support of this argument, the Grant Officer direct⁶ attention to 41 C.F.R. 29.3. 805-52 which reads as follows:

The competitive range consists of the proposals of those offerors, which, based either on an evaluation by a mathematical formula or by other means, are grouped more or less at the same level and are competitive with one another. In all cases it is important that the criteria used in establishing a competitive range be meaningful and realistic and in no **way** arbitrary. Determining firms which are and firms which are not within a competitive range is a matter of administrative discretion which must be exercised in a reasonable manner. A determination of the limits of the competitive range requires the comparison of each proposal against the other proposals. Therefore, there is no way to predetermine the number **of .or** percentage of proposals that will be competitive with one another. The limits of what constitute⁶ competitive range in a particular case is a judgment matter for determination by the contracting officer. Such discretion will be reasonable and justified and shall not be exercised In an arbitrary or capricious manner.

I have extreme difficulty in finding that argument to be persuasive.' In the first place, the cited section of the regulations can not be read by itself but must be read together with the 2 sections of the regulations that immediately follow it (i.e. 29-3. 805-53 and 29-3. 805-54). In this regard, it is noted that 29 C.F.R. 3, 805-53 provides that where a competitive range is established (after a review of the proposals), discussions with all offerors within the competitive range must take place; Furthermore, 29 C.F.R. 3~805.54 contemplates making award after discussions with all offerors are completed. In the case at hand discussions **were not** held with both offerors (i.e. MDOL and Penobscot) who were deemed to be within the "competitive range."

In this case the Grant Officer determined that the lower rated proposal of Penobscot was in a "competitive range" with that of MDOL. Since these two offerors fell within a ****competitive range,**** it was determined that Penobscot as the incumbent CETA grantee should be awarded the contract in order to avoid "start-up costs" and "disruption of service." Contrary to the applicable regulations cited above, MDOL was not given an opportunity to compete on a fair and equal basis with Penobscot once the Grant Officer established that they were in a "competitive range." In fact, MDOL was never notified of its status as a competitor within a "competitive range." While further information was sought from Penobscot concerning its area of coverage and whether it was willing to expand it, the Grant Officer never contacted MDOL concerning projected start-up costs and/or possible disruption of- services to individuals that were to be covered under the Act. Therefore, **I** find that there were not discussions with both offerors falling within the so-called "competitive range" as contemplated by the published DOL procurement regulations. Thus, even assuming that it was proper for the Grant Officer to establish a "competitive range" for offerors submitting proposals, I must conclude that competitive procurement policies set forth in the Department's published regulations were not followed, and hence I am constrained to find that, in selecting Pen'obscot as the grantee, the Grant Officer did not **"use procedures** consistent with standard competitive government procurement **policies"** as required by Section **402(c)(1)** of the Act.

More important and aside from the **above,** **I** find that in any event, the procedure used by the Grant Officer in establishing a so-called "competitive range" was totally defective and in violation of sound government competitive procurement policies. The "competitive range" contemplated by Regulations must be established with fairness so that no preferential treatment will be given to any individual offeror. Otherwise, the integrity of the competitive procurement process would be offended. In this case, **I** am unable to conclude that a proper "competitive range" was established. Under the facts involved in this case it is

clear to me that the so-called "competitive range" concept applied by the Grant Officer was, in reality, (and even though unintentional) a procedure giving an incumbent CETA grantee some preferential treatment. In this regard, it is pointed out that the '*competitive range' concept did not apply to all offerors but rather only to incumbent applicants handling MSFW programs under CETA. Thus, in a situation where there would be three offerors, one being the incumbent CETA grantee, no "competitive range" procedure would apply under the Grant Officer's "groundrules" if the incumbent CETA grantee scored the least points and was well below the **3-point** differential established by the Grant Officer, even though the other two proposals were scored higher than the incumbent's proposals and were within 2 points of each other. Under those facts, award would have been made to the offeror whose proposal had the highest score. Moreover, under the facts of this case if Penobscot's score was only 1 point more than that of MDOL, no "competitive range" would have been established and award would have been made to Penobscot.

The only instance where the so-called "competitive range" concept would have been applicable under the "groundrules" established by the Grant Officer was the extremely limited situation where the incumbent CETA grantee's score was lower than the highest score but within 3 points of that score. Presumably then, 'if there had been 3 offerors, under the "groundrules" established by the Grant Officer the incumbent CETA grantee would have been awarded the grant even if it had the lowest score of all three offerors if that score was no more than 3 points lower than the highest score. It is clear to me that such a procedure was designed to give some preferential treatment to an incumbent CETA grantee. Although the government has no obligation to eliminate the competitive advantage that an offeror may employ because of prior experience under a prior government contract or grant, the government should not insert such an advantage by *way* of a preference in rating proposals of offerors (See Varo, Inc., B-193789, **80-2** CPD 44, dated July 18, 1980; Ensec Service Corp., 55 Comp. Gen. 656, 76-1 CPD 34 (1976)). While I note that a Grant Officer has **.much** discretion in the grant award process, here the Grant Officer's discretion was not without bounds and was specifically **circumscribed** by the Act which required that grants be awarded using procedures "consistent with standard competitive government procurement policies". While the procedure used **by** the Grant Officer '**may**' have been well-intentioned, it nonetheless was not fair to all offerors and created an unfair advantage for incumbent CETA grantees. I therefore am constrained to find that under the specific facts of this case the Grant Officer abused his discretion in allowing a 3-point preference to incumbent CETA grantees, and that such a procedure was not consistent with standard competitive government procurement policies.

It can **not** be said that the preferential procedure utilized by the Grant Officer did not prejudice MDOL. In the first place, it is clear from the record that MDOL was prejudiced, because even though its proposal was scored higher than **Penobscot's**, it was not awarded the grant because of the 3-point advantage enjoyed by incumbent CETA grantees. Moreover, had it known at the time of preparing its proposal that concerns about "start-up **costs**" and "disruption of services" would be considerations in the evaluation of proposals, MDOL could have included pertinent information about start-up costs and disruption of service⁶ in its proposal which may have negated the allowance of a 3-point preference for the incumbent CETA grantee. In any event, it seems clear to me that MDOL was not treated fairly or on an equal footing with **Penobscot, the** Maine incumbent CETA grantee, and in sum I find that the award of the grant to Penobscot was not made by procedure⁶ "consistent with standard competitive government procurement policies" as required by the Act. I am constrained to conclude further that the Grant Officer acted arbitrarily and abused his discretion in granting a 3-point preference to Penobscot under the circumstances involved in this case. **I** therefore can find no legal **basis** in the record to support his decision to award the grant to Penobscot, and **I** conclude that the grant should have been awarded to MDOL.

ORDER

Accordingly, the Grant Officer is hereby ORDERED to take appropriate action specified in 20 C.F.R. 633.205(e). This Decision and Order shall constitute the final action by the Secretary unless either **party** and the Secretary take further action pursuant to the provisions of Section 166(b) of the Act.



CHESTER SHATZ
Administrative Law Judge

Dated: MAY 18 1984
Boston, Massachusetts

CS/pym

SERVICE SHEET

Case Name: Department of Labor v. State of Maine
Case No.: 84-JTP-2

Title of Document: DECISION

This is to certify that all listed parties have been served a copy of the above-captioned document on MAY 18 1984

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