

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 23 March 2005**

Case No. 2004-WIA-2

IN THE MATTER OF:

LIFELINES FOUNDATIONS, INC.  
Complainant

v.

U.S. DEPARTMENT OF LABOR,  
Respondent

THREE RIVERS AMERICAN  
INDIAN CENTER, INC.  
(THREE RIVERS),  
Party-In-Interest.

**DECISION AND ORDER**

This case arises under the provisions of the Workforce Investment Act, 29 U.S.C. § 2801 et seq. (WIA or Act) and the regulations contained at 20 C.F.R. § 660 et. seq. The WIA provides funding for job training and employment programs for Indian and Native American Tribes, under the administration of the Bureau of Indian Affairs. Grants aimed at Native Americans are overseen by the federal government, and parties interested in receiving such grants apply directly to the Department of Labor, pursuant to Solicitations for Grant Applications published in the Federal Register. Grants are made to specified geographic areas, and the recipient oversees the program in those areas. Parties which unsuccessfully apply for grants may request review of the grant officer's decisions by the Office of Administrative Law Judges. 20 C.F.R. §§ 667.800, 667.325.

In this case, Lifelines Foundation, Inc. (Lifelines) applied to be the grant operator for the state of Maryland and the District of Columbia for the 2004-2005 program years, but was rejected in favor of the incumbent operator, the Council of Three Rivers (Three Rivers). Lifelines appealed this matter to the Office of Administrative Law Judges. I held a formal hearing in Washington, D.C. on January 11, 2005. On February 11, 2005, I issued an Order establishing a briefing schedule. Lifelines submitted its brief on March 10, 2005; neither the Respondent nor Three Rivers have submitted a brief.

My decision is based on the evidence admitted at the hearing, which reflects the evidence

the Grant Officer had at the time he made his decision in this case.<sup>1</sup>

## **ISSUE**

Whether the decision of the grant officer was reasonable, and not arbitrary or capricious, an abuse of discretion, or not in accordance with the law.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Workforce Investment Act provides funds to organizations to provide employment and job training services to Indians and Native Americans. Because Indian and Native Americans are deemed best served by an Indian or Native American organization to coordinate resources within their communities, the WIA establishes a priority for awarding grants to such organizations.

Grants under the Workforce Investment Act are awarded every two years. When the appropriate time comes to solicit grantees, the Department of Labor publishes a Solicitation for Grant Applications in the Federal Register, which provides the deadlines and criteria by which interested organizations can apply for the grants. To do so, interested organizations submit a Notice of Intent to the grant officer, following the guidelines in the solicitation. If more than one organization applies to provide services in the same geographic area, the competing organizations are so notified, and are allowed to submit revised Notices of Intent. The competing applications are reviewed by a panel of technical experts, who individually review each application against the criteria listed in the Solicitation, compile strengths and weaknesses, and assign scores. These scores are then tabulated and averaged, and the results provided to the grant officer, who reviews the panel's recommendation. Additionally, he may request a pre-award clearance on the applicants, to ensure that there are no problems with fraud, debt collection problems, or disallowed costs on audit, on the part of any applicants. The grant officer is not bound to follow the recommendation of the panel. (GOX 1).

The party or parties not chosen for the grant can request that the grant officer reconsider the decision. The party losing the reconsideration request can then appeal the grant officer's determination to the Office of Administrative Law Judges.

In this case, the Solicitation for Grant Applications was published in the Federal Register on December 31, 2003 (GOX 1, E74-E80). It invited interested parties to submit a Notice of Intent for grants for the 2004 and 2005 program years, and included instructions for doing so. The Solicitation also set out five criteria that would be considered in selecting the grantee, as well as the points that would be assigned to each factor. In response, 31 entities submitted applications, and on March 4, 2004, letters were sent to each applicant notifying them that they were in competition with each other, and were allowed time to submit a "full" or "Part B" Notice of Intent, modifying or expanding on their initial application, or providing letters of support as to why they would be the better provider of employment and training services for the local Native

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<sup>1</sup> Specifically, I admitted the Department of Labor Administrative File as Grant Officer Exhibit 1 (GOX), and ALJ Exhibits 1-7 (ALJX).

American population (Tr. 44-45; GOX B1). Twenty seven of the applicants submitted a Final Notice of Intent.

Eric D. Luetkenhaus

The Grant Officer, Eric D. Luetkenhaus, was assisted in performing the initial review of the applications by the Division of Indian and Native American Programs (DINAP) (Tr. 45). DINAP provided information on the eligibility of the applicant organizations to be a grantee under the Native American Program, and conducted a responsibility review of the organizations. DINAP officials also discussed the applications and panel reviews of the organizations with the Grant Officer (Tr. 45).

Once he received the Part B applications from the remaining 27 applicants, Mr. Luetkenhaus convened a review panel, briefed the three members, and provided them with the proposals for review and scoring (Tr. 48-49). At the conclusion of the panel review, Mr. Luetkenhaus received a summary report from the panel chair, as well as individual panel reports (Tr. 49). The two applicants for the Maryland and District of Columbia area were Lifelines and Three Rivers. The average panel score for Lifelines was 51.5; the average panel score for Three Rivers was 13.83 (GOX 1 E; Tr. 50). Mr. Luetkenhaus determined that neither proposal was acceptable based on the scores. He then provided the panel scores to DINAP and asked them for any information they wished to provide on the competition (Tr. 51).

Mr. Luetkenhaus did not review the applications himself. He testified that the reason a panel is used to review applications submitted pursuant to an SGA is simply logistical: it is not possible for him to review each of the proposals in the many competitions for grants. As is somewhat standard in government competitions, his office uses panels of experienced reviewers to review the applications on his behalf. The panel has three members, so that the scores can be averaged. As a practical matter, however, Mr. Luetkenhaus cannot review every application submitted for competitions that he oversees (Tr. 85).

The SGA had a cutoff score of 70: it provided that if no applicant received a score of at least 70, the Grant Officer could either designate no service provider for the area, or designate an entity based on a demonstrated capability to provide services for the Indian and Native American population in the area, in this case, Maryland and the District of Columbia. Mr. Luetkenhaus realized that there was a serious problem with both scores, and thus he started "from scratch," and consulted DINAP for information related to the competition (Tr. 52). Mr. Luetkenhaus also asked DINAP for a recommendation on an alternative organization that had demonstrated capability to provide services in the area, in the event that he determined that neither of the two applications were satisfactory (Tr. 53). Mr. Luetkenhaus did not consider the option of declining to designate a service provider to be viable, as this would hurt the Native American population of Maryland and the District of Columbia (Tr. 56).

DINAP provided Mr. Luetkenhaus with a responsibility review, indicating that Three Rivers had met its performance goals for the program year 2002 (Tr. 54). DINAP was not able to identify an alternative organization. As Three Rivers was the only organization in the area with demonstrated capabilities to provide services, Mr. Luetkenhaus selected Three Rivers to

administer the grant (Tr. 55).

In his "WIA Designation: 2004-2005," Mr. Luetkenhaus set out his decision to award the grant for Maryland and the District of Columbia to Three Rivers. He stated:

Based on the review of the panel scores both applicants' scores were unsatisfactory. However, due to the fact that there were no other entities that could serve these areas and the satisfactory performance summary and responsibility review submitted by the program office I find awarding the incumbent, Council of Three Rivers, would be in the best interest of the Government and the participants to be served.

NOTE: The SGA states the Grant Officer may either designate no service Provider or may designate an entity based on demonstrated capability to provide the best services to the client population. DOL reserves the right to select applicants with scores lower than 70 or lower than competing applications if such selection would, in DOL's judgment, result in the most effective and appropriate combination of services to the client population, funding and costs.

(GOS 1, B2).

The SGA also provides that the Grant Officer may make a conditional designation. But Mr. Luetkenhaus did not consider that to be a viable option in this particular competition. He stated that both of the scores were sufficiently low that he did not entertain the idea of a conditional grant, based on the applications. After the scoring was completed, and Mr. Luetkenhaus had rejected both applicants based on their scores, he moved on to a "different logic test," a demonstrated capability test, to perform the selection process. It happened that the organization he selected, as recommended by DINAP, was one of the organizations in the competition. But his decision to select Three Rivers was not based on its ability to prepare a proposal; it was based on the demonstrated capability of Three Rivers to provide services to the client population in Maryland and the District of Columbia, as well as documentation reflecting that Three Rivers was meeting its performance goals (Tr. 57; 87-88).

After he made his decision, and while he was assembling the administrative file, Mr. Luetkenhaus discovered that the financial statements provided by Lifelines in its Part A application were not provided to the panelists during the panel review (Tr. 57). According to Mr. Luetkenhaus, the SGA does not require applicants to submit a financial statement with the application (Tr. 58). According to Mr. Luetkenhaus, the evaluation criteria, on which the competition is based, do not mention anything about review of a financial statement. The only way a financial statement would benefit an applicant would be during the eligibility phase of the competition, which was done much earlier in the process by DINAP. Both Three Rivers and Lifelines passed that initial eligibility review process, and thus he did not think the omission of the financial statements was an issue (Tr. 59). When he found the copy of the financial statement submitted by Lifelines, he noted that it would not make any impact on any of the evaluation factors used by the panel members (Tr. 59-60).

Mr. Luetkenhaus testified that during the application review process, he never raised any

questions about Lifelines' status as a Native American controlled organization (Tr. 61). He testified that he provided a complete copy of Lifelines' application to the panel members (Tr. 63-64). Nor did he receive any indication from the panel, during its deliberations, that anything was missing from the Lifelines application that they had received (Tr. 64).

Mr. Luetkenhaus testified that he would have expected a discussion of the One Stop System, a weakness identified by the panel in Lifelines' application, to be in the narrative of Part B of the application. However, he did not see any such reference in Lifelines' application (Tr. 88-89). According to Mr. Luetkenhaus, the One Stop System is a major component of the Department of Labor's efforts to provide training and employment services to unemployed and disadvantaged individuals (Tr. 90).

Susan Hill Roth

Ms. Roth is the Executive Director for Lifelines; she has worked in the Native American community for almost sixteen years (Tr. 18). Lifelines was incorporated in 2000, as a 501(c)(3) Indian organization. Lifelines was established to pick up the drop in services when the Baltimore American Indian Center stopped providing services in the Indian community (Tr. 18). The organization provides assistance in the areas of substance abuse, mental health, access to health care and employment related services, and any other basic needs (Tr. 18-19). Lifelines provides these services to about 200 Native Americans a year.

Lifelines decided to apply for the WIA grant because they had more people requesting employment services, for which they did not have direct funding, and they wished to improve on their services. Ms. Roth prepared the application, with the help of a consultant with experience in the Workforce Investment Act and the Job Training Program Act (Tr. 19). Ms. Roth also prepared the applications for a federal Indian health services grant, which Lifelines has operated for over four years. Lifelines has received satisfactory and even outstanding reviews for their performance in administering this grant (Tr. 20).

Ms. Roth testified that when she received the non-determination letter, there was no reason given as to why they were turned down. She tried to call Mr. Luetkenhaus several times, but he could not give her an answer, because he did not have the file before him. She felt that Lifelines was the best qualified organization, and thus she filed an appeal (Tr. 21). She then discovered that Lifelines had received a panel score over three times higher than Three Rivers. When she read the panelists' comments, it appeared to her that they did not have all of the information that she had submitted (Tr. 21). For example, the panel reviews indicated that the panel members did not have a copy of an audit report that Ms. Roth had submitted with her Part A application (Tr. 22). The panel summary also indicated that Lifelines did not provide evidence that it is an Indian controlled organization serving Native Americans. But according to Ms. Roth, she submitted a list of the Board of Directors, their names and addresses, and their tribal affiliations. She also provided letters of support from the Indian community, memoranda of agreement with job placement services, and review letters from Indian Health Services reflecting a contract for Native Americans (Tr. 22-23).

Ms. Roth also testified that the panel summary of weaknesses for Lifelines' application

noted that although Attachment A was supposed to contain evidence of Indian Native American support, Attachment A was a single letter from the Somerset County Services, Inc. In fact, Ms. Roth had submitted ten letters and a memorandum of agreement with her Attachment A (Tr. 25). The summary also indicated that there was no discussion of working with One Stop Systems to eliminate duplication of effort, and that Lifelines needed to demonstrate coordination and linkages within the community to eliminate duplication of effort. But according to Ms. Roth, she had a letter of agreement from the Baltimore County One Stop Employment Services, and a memorandum of agreement from Maryland New Directions to provide job services to Native American women, with monitoring to avoid duplication of services (Tr. 26).

Ms. Roth conceded that the application criteria in Part B did not include any specific request for proof of financial ability, and that an applicant's financial condition would relate to the eligibility portion of the application review process (Tr. 30). She also agreed that Lifelines' financial report was in Part A of its application, and that Part B did not make any reference to the financial report, although she stated that she knew she enclosed it with Part B (Tr. 31-32).

Ms. Roth agreed that Lifelines does not have any experience operating employment and training programs for Native Americans under the Workforce Investment Act or the Job Training Partnership Act, but she stated that they do have experience operating training programs and employment services for Native Americans (Tr. 37). She also agreed that, although Lifelines had experience in placing Native Americans in unsubsidized employment, the application did not refer to any such experience (Tr. 38). Although she testified that Lifelines' service area covered the whole state of Maryland and the District of Columbia, she agreed that the information submitted in the application shows that Lifelines serves a population primarily in the City of Baltimore and surrounding counties (Tr. 39).

John Richard

Mr. Richard is the WIA Program Director for Three Rivers (Tr. 110). He testified about the history of the application for the grant and their participation as a grantee for the Department of Labor's Employment and Training Programs for Native Americans. Mr. Richard has been with Three Rivers since 1976, when Three Rivers began administering employment and training programs for Native Americans (Tr. 111). He testified that Three Rivers has operated programs under the CETA, JTPA, and WIA grant programs (Tr. 103).

According to Mr. Richard, in 2000, when the Department of Labor had problems with the Baltimore American Indian Center, which had been defunded, Three Rivers was asked to work with the Maryland and District of Columbia service areas, and eventually took over the service areas, with no loss of participants. (Tr. 103).

Although Three Rivers initially tried to open an office in Frederick, Maryland, a location central to the areas to be served, they eventually obtained space with the Western Maryland Consortium, and they have been working there with the One Stop Center since that time. According to Mr. Richard, the grant is less than \$200,000, with over 20,000 American Indians in Washington, D.C. and Maryland. It is very difficult to operate programs on such a small budget. He testified that other providers have failed in operating small programs with the provided

funding and the administrative requirements, but Three Rivers has never failed in a responsibility review in its 29 years of providing services under the programs (Tr. 104-105). Nor has Three Rivers ever had disallowed costs under any of its grants (Tr. 112). They have also exceeded performance standards every year (Tr. 113).<sup>2</sup> For example, for the program year 2002, Three Rivers had an “attainment rate” (percentage of clients who entered unsubsidized employment) of 68.9 percent, compared to the minimum requirement of 42 percent (Tr. 116).

Mr. Richard testified that Three Rivers provides services based on about \$1500 per participant, when the national average for all programs is \$2755 per participant. That does not account for the fact that Three Rivers serves a huge geographic area.

Mr. Richard pointed out that all of this information was available within the Department of Labor, and to the Grant Officer in making his final determination. He stated that Three Rivers serves individuals throughout the State of Maryland, including the Eastern Shore, Southern Maryland, Western Maryland, and Baltimore County; they have participants in training facilities throughout Baltimore County (Tr. 107). According to Mr. Richard, Three Rivers has received awards and recognitions of their ability to provide services and programming for the Indian and Native American population in Maryland and the District of Columbia. Most recently, Three Rivers received the Department of Labor, Division of Indian and Native American Programs outstanding grantee award, in May 2004 (Tr. 108).<sup>3</sup>

## **DISCUSSION**

As I informed the parties at the hearing, my role in this proceeding is to review the evidence that was available to the grant officer at the time that he made his decision, and determine whether his decision was arbitrary and capricious, an abuse of discretion, or not in accordance with the law. This is a high threshold for a party to overcome, and occurs only when a decision is based on an erroneous view of the law, or a clearly erroneous assessment of the evidence. Even if I disagree with the Grant Officer’s decision, I must uphold it if I find it to be reasonable.

Lifelines argues that critical information in its application was not provided to the panel, the consideration of which could have improved Lifelines’ panel score. Mr. Luetkenhaus acknowledged, both in his administrative file and his testimony at the hearing, that he discovered after the panel review process was complete that the financial statement provided by Lifelines in its Part A was not sent to the review panel. But as he stated, and Ms. Roth conceded, this information is not required at that stage of the application process. Rather, it is considered earlier, in determining the financial eligibility of the applicants. Lifelines had successfully passed that step. I agree with Mr. Luetkenhaus, that the omission of the financial statement had no determinative effect on the outcome of the panel review.

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<sup>2</sup> Mr. Richard testified that, as a member of various advisory panels, he had helped design the performance measures (Tr. 114).

<sup>3</sup> In response to Mr. Richard’s testimony that Three Rivers had received referrals from Lifelines, Ms. Roth testified that Lifelines had referred a number of people to Lifelines, and had offered free office space to Lifelines. According to Ms. Roth, the services the clients needed were not eligible under the Three Rivers Program (Tr. 118).

The Summary of Strengths and Weakness for Criterion C(i) with respect to Lifelines' application states:

Unfortunately the applicants [sic] states in both Part A and B concerning the planning process that they have support letters from two non-profit Indian organizations and MOUs with over 10 health agencies, but only one letter is attached.

(GOX 1 E6). Lifelines interprets this statement as indicating that the panel received only one of the numerous support letters attached to Section A of its application. However, I find that this statement is susceptible of other interpretations. A review of the letters included in Section A shows that there are ten letters in support of Lifelines' application for the grant. Only one of these was from an "Indian organization," the letter from the National Council of Urban Indian Health. There was also a Memorandum of Agreement between Lifelines and the Community Native American Program in Baltimore, Maryland. Finally, there was a brief letter from Somerset Community Services, Inc., indicating that it would be willing to provide opportunities for student placements at its agency.

A more reasonable interpretation of the statement in the Summary of Strengths and Weaknesses is that it refers either to the fact that Section A contained only one MOU, or only one support letter from an Indian organization. Mr. Luetkenhaus categorically stated that he provided all of the material submitted by Lifelines in its Part B application to the panel members. I had the opportunity to observe Mr. Luetkenhaus during his testimony, and I found him to be a credible witness.

I find that Lifelines has not established that the panel members were not provided with all of the material in Section A of its application.

Lifelines argues that it was unreasonable for the Grant Officer to make his determination without reviewing the applications. As Mr. Luetkenhaus testified, he is not able to personally review all of the applications submitted in the many grants that are offered every year. Under these circumstances, the use of experienced panels to review and score the applications is reasonable and practical. But once this process has concluded with no applicant scoring higher than the cutoff, the application phase is essentially concluded. At that point, the Grant Officer's focus changes to a search for an established service provider with demonstrated capabilities to administer the grant. As Mr. Luetkenhaus described it, it is a "different logic test." Indeed, a grant proposal by its nature is a prospective presentation of the services the applicant believes it can provide. But Mr. Luetkenhaus was looking for a provider with a demonstrated track record for successfully providing services. Lifelines has not explained why it would be important for Mr. Luetkenhaus to consider the grant applications against that criterion.

Here, the Grant Officer followed the procedures set out in the SGA to the letter. As he testified, the goal of the grant solicitation process is to select the service provider best able to provide services to the client population. It is not a competition in grant writing.

Lifelines also argues that the Grant Officer's failure to designate it as a conditional grantee was unreasonable, in light of the fact that its panel score was so much higher than Three



Rivers'. But the Grant Officer determined that, on the basis of the panel scores, neither applicant should be awarded the grant. Under these circumstances, the fact that Lifelines received a higher score than Three Rivers is irrelevant: both of them were below the minimum cutoff score. Other than the fact that its panel score was higher than Three Rivers', Lifelines has not articulated exactly why it was unreasonable for the Grant Officer to forego the option of awarding Lifelines a conditional grant.

Finally, Lifelines argues that "common sense" dictates that it is unreasonable on its face for an applicant with a terrible grant application to be awarded the grant. Again, however, Lifelines is comparing apples with oranges. Clearly, as between Three Rivers and Lifelines, Lifelines won the grant writing competition. But since neither applicant scored above 70, as the SGA allows him to do, the Grant Officer chose neither applicant, and instead attempted to find a service provider with demonstrated capability to administer the grant. As it happened, the only entity that met that criterion was Three Rivers. At this point, the applications, and the panel scores, were simply not germane to the process.

I conclude that the Grant Officer's determination to award the grant in question to Three Rivers was reasonable, and not arbitrary or capricious, an abuse of discretion, or not in accordance with the law. Lifelines has not established that the panel's conclusions were not based on a fair and adequate review of the available information. In light of the fact that Three Rivers has a long and successful history of operating Native American programs under grants from the Department of Labor, while Lifelines does not, I find that the Grant Officer's decision to award the grant to Three Rivers was reasonable, in light of the information he had available to him at the time. Thus, the Grant Officer's decision is affirmed.

### **ORDER**

For the above-stated reasons, IT IS HEREBY ORDERED that the request by Lifelines Foundation, Inc. that the June 16, 2004 decision of the Grant Officer be reversed is denied.

SO ORDERED.

**A**

LINDA S. CHAPMAN  
Administrative Law Judge

Notice of Appeal Rights: The decision of the administrative law judge shall constitute final action by the Secretary of Labor unless, within 20 days of the judge's decision, a party dissatisfied with the decision has filed exceptions with the Secretary (Administrative Review Board) specifically identifying the procedure, fact, law, or policy to which exception is taken. Thereafter the decision of the administrative law judge shall become the final decision of the Secretary unless the Secretary, within 30 days of such filing, has notified the parties that the case

has been accepted for review. The petition for review must be filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. A copy of any such petition must also be sent to the opposing party at that time. 20 C.F.R. § 667.830(b).