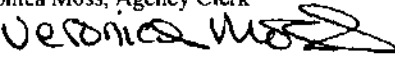


AWI Order No. GA2002-11-00087 Date: 2/10/03  
FILED  
Agency for Workforce Innovation  
AGENCY CLERK  
Veronica Moss, Agency Clerk  
By: 

**AGENCY FOR WORKFORCE INNOVATION**  
An Executive Agency of the State of Florida

In Re: SABER, INC.,  
Appellant,  
and,

AWI Case No.: GA 2002-11-00087

South Florida Workforce,  
Appellee.

AGENCY DECISION ON APPEAL OF LOCAL PROCUREMENT DECISION

**BACKGROUND**

This matter has come before the undersigned pursuant to the Workforce Investment Act of 1998 (WIA), as codified at 29 United States Code (USC), sections 2802 et seq., the applicable federal regulations as contained in 20 Code of Federal Regulations (CFR), part 652 et seq., and the Florida Workforce Innovation Act, as contained in Chapter 445, Florida Statutes.

The Workforce Investment Act is the federal employment and training initiative, designed to increase occupational skills, improve the quality of the workforce, reduce welfare dependency and enhance the productivity and competitiveness of the national economy. The program is implemented through the federal funding provided for the workforce systems in the several states. The Florida legislation parallel to the federal program is known as the Workforce Innovation Act.

## **WORKFORCE ENTITIES AND THE PARTIES**

**The Agency for Workforce Innovation (AWI)** as created by section 20.50, Florida Statutes, is the grant recipient of federal workforce funds and the state entity responsible for the administration of workforce policy as established by Workforce Florida, Inc.

**South Florida Workforce (SFW)** The South Florida Workforce Board and the South Florida Employment and Training Consortium compose the SFW. The South Florida Workforce Board is the local workforce board for the state Region 23, chartered by WFI as required by 445.004 (11), Florida Statutes. The South Florida Employment and Training Consortium (SFETC) is made up of representative from Miami-Dade and Monroe Counties and Cities of Miami, Hialeah, and Miami Beach. By local agreement the consortium represents the area's local elected officials in the governance of the Region's workforce system. The local boards are responsible for the development of the local workforce plan and generally coordinating workforce activities. The workforce services are provided through "One-Stop" centers located throughout the state. The One-Stop centers are designed to provide comprehensive employment and training and human services within the same location. It is the SFW and SFETC's responsibility, jointly, to select One-Stop operators as required by 20 CFR 661.305 and §445.009 (2)(b), Florida Statutes. The One-Stop operators coordinate services within the local centers, as provided in 20 CFR 662.400 (c). SFW operates several One-Stop centers within Region 23. A One-Stop operator may oversee more than one center within Region 23.

**Spanish American Basic Education and Rehabilitation, Inc. (Saber)**- Saber, Inc. is the Appellant in this proceeding. Saber currently operates the Little Havana #1 One-Stop in the Little Havana section of Miami, Florida. Saber submitted a letter of intent to bid on operation of the new Little Havana Consolidate One-Stop facility.

**Youth Co-Op, Inc. (Youth Co-Op)** – Youth Co-Op currently operates the Little Havana #2 One-Stop facility in the Little Havana section of Miami, Florida, as well as the other One-Stops within the region (Opa-Locka and West Dade). Youth Co-Op was the successful bidder and awarded the contract for the operation of the new Little Havana Consolidated One-Stop.

## **JURISDICTION AND STANDARD OF REVIEW**

The WIA section 181 (c) and applicable regulations in 20 CFR, part 667, subpart F, require that the State and each local area adopt a procedure for dealing with grievances

and complaints. As described in section 667.600 (b) (1) of 20 CFR, the local procedures are required to accommodate the grievances and complaints of participants and other interested parties affected by the local Workforce Investment System. In the present case, Saber, Inc. filed a grievance at the local level contesting the procurement of One-Stop operators within Region 23 by SFW. Because Saber was not satisfied with the decision at the local level, it appealed that decision to the State, as provided in 20 CFR 667.600 (c). The present matter is being conducted by the State in its review capacity, as provided in the State's grievance procedures promulgated as rule chapter 60BB-1, Florida Administrative Code.

The following designations will be used herein:

R. – the Record prepared by SFW  
Saber, p. x. – written argument submitted by Saber

### **STATEMENT OF THE CASE**

This case began when Saber was denied the award of the contract to operate the new Little Havana Consolidated One-Stop center. After being unsuccessful in its informal and formal local appeals, Saber brought this appeal.

### **FINDINGS OF FACT**

Based upon review and consideration of the documentation and written arguments submitted by the parties, the following have been determined to be the relevant facts.

1. The SFW developed a plan to consolidate the services provided at the One-Stop centers under its jurisdiction. During the second phase of the plan (Phase II), the two

existing One-Stops in the Little Havana area of Miami, Florida were to be consolidated into one One-Stop facility.

2. Little Havana #1 located at 3990 W. Flagler, Miami, Florida is currently operated by Saber. Little Havana #2 located at 3525 NW 7<sup>th</sup> Street, Miami, Florida is currently operated by Youth Co-Op. The current contract for operation of each One-Stops has been extended until March, 2003.

3. The SFW Board determined that they would accept letters of intent for the operation of the One-Stop facilities that were part of Phase II of the plan. There were 16 competitions for One-Stop operations included in the Phase II solicitation. On July 5, 2002, the SFW issued a solicitation for providers of services for the Region's One-Stop system. (R 16)

4. The following guidelines, pertinent to this appeal, were established for the competitive process (R 30):

Organizations with PY'01 track records of providing One-Stop services inside the Region's One-Stops will be able to respond to this solicitation through an abbreviated competitive procurement process that will rely most heavily on performance data the region already has in-house, analyzed through a number of alternative formats that will be developed over the next few weeks, and other considerations that the Boards may determine to use in the analysis. As data are developed, they will be posed on the SFW website so that all potential applicants will be aware of all the data and all the formats being used. Providers wishing to suggest formats for analysis and variables to be considered for use are invited to recommend these formats through public bulletin board that will be posted on the website. Analysis options developed as of the date of the Offerors' Conference on July 12<sup>th</sup> will be discussed at that time.

Performance data for WIA, Wagner-Peyser and Welfare Transition that will be analyzed will cover the cumulative period July 1, 2001 through June 30, 2002, for WIA and Wagner-Peyser measures where cumulative data are available for our use. In the case of Welfare Transition data where what is available is for only specific months, the data will be used for as many months as the Region's data disaggregated by One-Stop is available to us. WIA data through June 30<sup>th</sup> outcomes will be calculated with a cut off point entries in the official WIA MIS System as of 5:00 p.m. on July 31, 2002.

Each organization's performance data will be analyzed in alternative formats to provide as complete a picture as possible of each organization's performance.

Organizations wishing to be considered will be required to submit the Letter of Intent form that is provided in Part Three, through which they specify: (a) the One-Stop facilities for which they wish to be considered, in rank order of their preferences; (b) specific requested information about any proposed subcontracting and track record and capability information about any proposed subcontractor(s); and (c) required attachment provided in Part Three. (R000031)

5. On July 25, 2002, Saber submitted its Letter of Intent regarding One-Stop services for the Hialeah Central, Little Havana Consolidated and the Florida City Consolidated One-Stops. Saber ranked their choices 1 through 3 with Little Havana Consolidated being their first choice. (R139-241)

6. On August 19, 2002, funding recommendations were developed at a public forum. The initial funding recommendations were developed through evaluations based on the State of Florida Red/Green Report.<sup>1</sup> The recommendation regarding performance criteria for the Little Havana Consolidated One-Stop showed that Saber had no reds at the Little Havana #1. Youth Co-Op had no reds overall for its operation of Little Havana #2, Opa-Locka, and West Dade. However, the individual performance for Little Havana #2 and Opa-Locka had one red at each center. (R 244-257)

7. Based upon this information, on August 20, 2002, a recommendation was made and approved by the Joint Welfare to Work and Programmatic Committees and the Executive Committee (sub-committees for the SFW) that the Little Havana Consolidated Center be awarded to Saber. (R258-311)

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<sup>1</sup> The Red/Green report is a tabulation of data received regarding performance standards established by the State of Florida. A "red" indicates that a service provider is failing a state required performance standard.

8. On August 20, 2002, Harriet Spivak, the Executive Director for the SFW Board sent notices to both Saber and Youth Co-Op advising them of their right to an informal resolution conference to be held August 23, 2002. (R 312-319)

9. Youth Co-Op appealed the recommendation and was scheduled for the August 23<sup>rd</sup> informal resolution conference. Saber did not appeal. (R-320)

10. At the August 23, 2003 informal resolution conference, Youth Co-Op presented an argument that the welfare transition data used by the state to rate the centers contained duplicate entries that skewed the data. As a result of the presentation made by Youth Co-Op, the SFW Board staff re-analyzed the data for all the One-Stop competitions in the Phase II plan. (R 323 -- R 357)

11. At the SFW Board Meeting held on August 28, 2002, Executive Director Harriet Spivak explained to the Board the results and ramifications that the appeal process has created in the scoring process for the One-Stop solicitations. The Board deferred the funding recommendations until the September 2002 board meeting which would allow staff time to complete all the re-evaluations of data. (R 360)

12. On September 13, 2002, there was another public forum to discuss the evaluation of the performance measures. Once the re-evaluation was complete, the data reflected that Saber had one red for its operation at Little Havana #1 and Youth Co-Op had zero reds for all the centers it operated but still had one red for operation of the Little Havana #2. (R 377-419)

13. The Welfare to Work and Programmatic Committees met on September 17, 2002. At this meeting, the committee was presented with the re-analysis of the data. Neither committee took any action on the funding recommendation. (R 420-428)

14. During the Executive Committee held on September 17, 2002, the Committee had an extended discussion on the award of the Phase II One-Stops. Because the data had been extremely close, the Committee chose to adopt additional criteria for the evaluation. The three additional criteria were: (1) residency – ties to the community; (2) ties to the employer base, and; (3) scale – ability to expand operations. (R 435-438 and 9/17/02 Executive Committee Meeting, Tape 1 Side B)

15. Once these new criteria were added to the equation there was extensive discussion of the effect that the award of the Little Havana Consolidated center would have on several of the other One-Stop solicitations. Because of the “domino effect” the award of this center would have on the competitions for the Hialeah Central, Miami-Edgewater and Little River One-Stop competitions, the executive committee focused on the scale capabilities for all these vendors and competitions. Each of these competitions had vendors with very similar data from the Red/Green Report. ( 9/17/02 Executive Committee Meeting, Tape 1, Side A and B)

16. The award of these other centers hinged on the outcome of the Little Havana Consolidated Competition. The focus became scale capability for the award of the Little Havana Consolidated Competition because both vendors had operated in the area and had ties to the community and the employer base. ( 9/17/02 Executive Committee Meeting, Tape 1, Side A and B)

17. According to the Wagner-Peyser data available, Saber’s case at the Little Havana #1 facility was approximately 7,000 cases. Youth Co-Op’s caseload combined

from the three centers it operated was approximately 49,000 cases.<sup>2</sup> (9/17/02 Executive Committee Meeting , Tape 1 Side B)

18. Based upon the considerations of scale, the Committee recommended the Hialeah Central One-Stop be awarded to Saber (which would increase their caseload to approximate 12,000 cases) and recommended Little Havana Consolidated be awarded to Youth Co-Op (which would increase their caseload from 49,000 case to 56,000 cases.)<sup>3</sup> (R429-434)

19. On September 17, 2002, Saber was advised by letter of its right to an informal resolution conference concerning the Executive Committee's recommendation on the award of the Little Havana One-Stop center. (R 602)

20. An informal resolution conference was scheduled and held on September 20-24, 2002. Both Saber and Youth Co-Op attended the informal resolution conference. The result of the conference showed both Saber and Youth Co-Op at zero reds. (R 611-663)

21. The SFW Board met on September 25, 2002 and approved the funding recommendation to award Youth Co-Op the Little Havana Consolidated One-Stop. Saber was awarded the Hialeah Central One-Stop. (R 675-681) The tapes of the Board meeting reflect that the both Saber and Youth Co-Op were represented as having zero reds at their existing facilities. (SFW Board Meeting 9/25/02 Tape1 Side A)

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<sup>2</sup> Youth Co-Op caseload was approximately 35,000 cases at its West Dade One-Stop, 5,200 cases as its Opa-Locka One-Stop and 9,000 cases at the Little Havana #2.

<sup>3</sup> The bidders were asked in the initial solicitation to rank the order of which facility they would prefer to receive. Saber rated Little Havana Consolidated as their first choice and Hialeah Central as their second choice. Youth Co-Op rated the Little Havana Consolidated equally with its other two selections.



22. The funding recommendations were also approved at the South Florida Employment and Training Consortium (SFETC) meeting on September 27, 2002. (R 682-685)

23. On October 2, 2002, the SFW Board notified Saber of its right to appeal the decisions of the SFW Board and the SFETC. (R 690-694)

24. Saber filed its Formal Appeal on October 10, 2002. The stated basis for the appeal was that there were errors in the welfare transition numbers that would render the red/green scoring inaccurate. Saber represented that the original scoring of having them with zero reds and Youth Co-Op with one red was the correct result and based upon that result, the original recommendation of awarding Saber the Consolidated Little Havana One-Stop should be reinstated. (R 695-710)

25. A formal appeal hearing was held on October 22, 2002. After full review of the information presented by Saber, the appeal panel upheld the recommendation of funding for the Little Havana One Stop to Youth Co-Op made based upon the evaluation of the scale capabilities of the competitors for the Phase II competitions. (R 722-725)

26. All meetings of the workforce committees, workshops, SFW Board and SFETC meetings were posted on the SFW web site as reflected by copies of the SFW Calendar. Each notice sent by the SFW board regarding rights to informal conferences contained the date and time that the conferences were scheduled. (R243 and R373-376)

### **CONCLUSIONS OF LAW**

The local workforce boards such as SFW are not subject to state procurement law, once they have in place procurement standards that been approved by Workforce Florida,

Inc.<sup>4</sup> §445.007(11), Fla. Stat. “A regional workforce board may designate as its One-Stop delivery system operator any public or private entity that is eligible to provide services under any state or federal workforce program that is a mandatory or discretionary partner in the region’s One-Stop delivery system if approved by Workforce Florida, Inc., upon a showing by the regional workforce board that a fair and competitive process was used in the selection.” §445.009(2)(b), Fla. Stat.

The underlying legal determination to be made in this case is whether SFW used a fair and competitive process in awarding the contract for operation of the Little Havana Consolidated One-Stop.

The Agency’s decision in TTI America, Inc. v. SFW, 2002/08-00018, (November 26, 2002) established the standard of review for these type cases as a “rational basis” determination. The Agency found in TTI that “[t]he rational basis standard is akin to the standard applied to government procurement cases where the validity of an exercise of discretion may be challenged only upon a clear showing that the agency action was arbitrary and capricious or an abuse of discretion or was not in accordance with the law. See Tackett v. Schaffer, Inc. v. U.S., 633 F. 2d 940 Ct. Cl 1980.” This standard parallels closely to Florida law involving review of procurement issues. “In Florida, ... a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.”

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<sup>4</sup> It should be noted that the Appellant in this case did not challenge the adoption of the procurement procedures by Workforce Florida, Inc. but has only challenged the application of a fair and competitive process, therefore this review does not address the validity of the establishment of the procurement procedures by the SFW.

Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982). While the discretion vested in a public agency may not be exercised arbitrarily or capriciously, the court will generally not interfere with the agency's judgment as long as the agency has acted in good faith. Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949).

It appears from a review of the record presented, that the action by SFW of awarding the Little Havana Consolidated One-Stop was not an arbitrary or capricious action. The record clearly reflects that the SFW Board recognized that the two vendors vying for the Little Havana Consolidated One-Stop were both exceptional organizations. The Executive Committee chose to adopt additional standards when it was clear that there were several competitions where the vendors competing were extremely similar in the performance data.

The Appellant has alleged in its brief that the SFW was not in compliance with the applicable law by straying away from the notions of fairness and failing to adhere to the established policies, rules and procedures. (Saber pg.8) The original standards for the bid process did indicate that performance at existing One-Stop facilities would heavily weigh upon the selection process. Both vendors were given the opportunity to present data that would in some way impact the established Red/Green report. After re-analysis by the Board staff, it was determined that any further re-calculations would result in the two vendors being "neck-in-neck" for the award of this particular One-Stop. Re-analysis of the data reported in the Red/Green report rendered the competition too close for the SWF board staff to indicate there was a clear leader in the competition.

The Appellant argues that it was prejudiced because inaccurate information relative to the red/green recalculations was presented at the September 17, 2002

committee meeting. The record indicates that SFW Board staff had made numerous re-calculations and each re-calculation showed the two competitors for the Little Havana Consolidated One-Stop as being within “pennies” of each other. (9/17/02 Executive Committee Meeting, Tape 1 Side B)

In the end, the Executive Committee made a choice to examine additional criteria, which was not prohibited by the bid solicitation. The invitation to bid stated:

“Organizations with PY’01 track records of providing One-Stop services inside the Region’s One-Stops will be able to respond to this solicitation through an abbreviated competitive procurement process that will rely most heavily on performance data the region already has in-house, analyzed through a number of alternative formats that will be developed over the next few weeks, **and other considerations** that the Boards may determine to use in the analysis.”

The SFW was certainly within the procedural requirements to consider other factors beyond the performance data. In this particular competition, scale capabilities became the emphasis for awarding the contract for the Little Havana Consolidated One-Stop. The Executive Committee’s concern over the ability of Saber to absorb twice its current caseload is not an unreasonable concern. Once the Executive Committee examined the scale capabilities, their decision was made on a rational basis. Even if reasonable people might have disagreed with the final analysis, this action was not arbitrary or capricious. The Appellant does not argue in its brief that the application of the three additional criteria was arbitrary or capricious, but chose to focus on the actual application of scale to the original determinations for other competitions on which Saber had bid. (Saber at pg. 9)

The Appellant has argued that SFW did not administer this decision with a fair hand and that Youth Co-Op was allowed unlimited opportunities to re-calculate its data but Saber was not afforded the same opportunity. There is no basis for this argument in

the record. All the meetings regarding the Phase II competitions were noticed on the SFW web site. While Youth Co-Op's informal appeal may not have been on the web site, Saber received written notification of the date that the informal conferences were to be held. If Saber did not chose to participate in that Youth Co-Op's informal conference, it cannot be held against SFW that Saber did not avail itself of the opportunity to appear at Youth Co-Op's informal conference.

Saber did have an opportunity at its informal and formal appeal to have the data re-analyzed based upon the information it presented at both appeals. The result at both levels showed how similar the providers were in this competition. Each time the SFW Board staff re-calculated the data the results fluctuated back and forth between the two vendors. This realization regarding the analysis resulted in the board staff not being able to make a recommendation to the Executive Committee at its September 17, 2002 meeting. It was precisely that realization that led to the Executive Committee to develop the additional criteria for application to the contests that were to close to determine based upon the data analysis.

Saber has also complained that the information regarding the scoring data was not continuously available on the web site during the scoring process as represented by Ms. Spivak. However, the parties were certainly on notice from the public forums held September 13, 2002 that all results from the re-analysis of data showed the competition was very close and kept showing one or the other ahead at various stages. Ultimately, the scoring data was not the final deciding issue between the competitors. Therefore, there could be no apparent unfairness to Saber at the failure to update last minute data on the

web site when it was clear that the scoring data yielded no clear winner in the competition.

WHEREFORE, the undersigned finds:

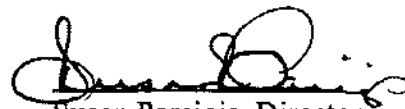
1. The record contains a "rational basis" for the actions taken by the SFW and SFW did not abuse its discretion in awarding Youth Co-Op a contract to operate the Little Havana Consolidated One-Stop center.

2. The SFW was operating within its established procedures when it adopted the three additional criteria to apply to the Phase II competitions that were too close award based upon the performance data.

3. There was no departure from the established appeal procedures set forth by the SFW. The bid solicitation for the operation of the Little Havana Consolidated One-Stop was a fair and competitive process.

4. The appeal of Saber is dismissed.

DONE and ORDER, this 7<sup>th</sup> day of February 2003, in Tallahassee, Florida.



Susan Pareigis, Director  
Agency for Workforce Innovation

## **NOTICE OF RIGHTS TO APPEAL**

### **FEDERAL**

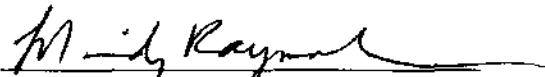
This Agency Decision is rendered pursuant to Workforce Investment Act regulation 20 CFR 667.600(c)(4) and Agency for Workforce Innovation rule Chapter 60BB- 1. A party adversely affected by this decision may petition the Secretary of the United States Department of Labor within 60 days of receipt of this decision. Any appeal must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, 2000 Constitution Ave., N.W., Frances Perkins Building, Washington, DC 20210, Attention ASET. A copy of the appeal must be simultaneously provided to the ETA Regional Administrator, U. S. Department of Labor, ETA, Atlanta Federal Center, 61 Forsyth Street, S.W., Room 6M12, Atlanta, GA. 30303 and to the AWI, Office of the General Counsel, 107 E. Madison Street, Caldwell Building, MSC # 150 Tallahassee, Fl. 32399-6545.

### **STATE**

THIS DECISION CONSTITUTES FINAL AGENCY ACTION, pursuant to §120.68(2), Florida Statutes, Judicial Review of this proceeding maybe instituted by filing a notice of appeal in the district court of appeal in the appellate district where the Agency maintains its headquarters or where a party resides. Such notice of appeal must be filed with the district court of appeals within thirty (30) calendar days of the date this order is filed in the Official Records of the Agency for Workforce Innovation, as indicated in the certification of the Agency Clerk, or further review will be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was provided by U. S. Mail, this 10<sup>th</sup> day of February 2003, to Mr. Carlos Lacasa and Mr. John Moore at Ruden, McClosky, Smith Schuster & Russell, P.A., Attorneys for Saber, Inc., 701 Brickell Avenue, Suite 1900, Miami Florida, 33131, and to Ms. Maria E. Abate, Attorney for SFW, 2000 West Commercial Blvd., Suite 232, Fort Lauderdale, Florida 33309.

  
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