

UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, D.C. 20202

OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF

Pueblo of Pojoaque,  
Applicant.

Docket No. 13-22-O

Native American  
Career and Technical  
Education Program Proceeding

Appearances: Governor George Rivera, Lt. Governor Joseph M. Talachy, Vernon G. Lujan, and Steffani Cochran, Esq. for the Pueblo of Pojoaque

Daphna Krim, Esq., Office of General Counsel, United States Department of Education for the Assistant Secretary for Vocational and Adult Education

Before: Chief Judge Allan C. Lewis

**DECISION**

In the first part of 2013, the U.S. Department of Education conducted a grant competition for new awards under the Native American Career and Technical Education Program (NACTEP), as authorized by the Carl D. Perkins Career and Technical Education Act of 2006, Section 116 (20 U.S.C. § 2326). The NACTEP funds projects that provide Native Americans with career and technical education and training. Grant awards are made on a competitive basis under the criteria set forth in the Department's Notice Inviting Applications for new awards for FY 2013 and the Notice of Final Requirements, Definitions, and Selection Criteria, as published in the *Federal Register* on February 26, 2013 (78 F.R. 13030; 12955). A total of 155 points could be awarded under the NACTEP FY 2013 selection criteria, including 10 additional points available to applications that included exemplary approaches with respect to tribal economic development plans and five additional points for certain tribal colleges and universities.

The Department reviewed 42 eligible applications and convened six panels of expert readers, each comprised of three peer reviewers, to evaluate the applications.<sup>1</sup> The review panels were then randomly assigned applications to score against the established program criteria. The final scores were then ranked in order on a funding slate. The Pueblo of Pojoaque (Pojoaque or Applicant) received a score of 110.67 (out of 155) and was ranked 32<sup>nd</sup> of 42. The Department anticipated funding the top 31 applications, and, accordingly, Pojoaque was denied funding because its application scored below the funding range for this competition. At the end of May,

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<sup>1</sup> In this decision, the terms "reader" and "reviewer" refer to the individuals who read and evaluated the grant applications and are used interchangeably.

the Department notified all applicants of the award determinations. Pojoaque was one of 11 applicants who was notified that its project would not be funded. Thereafter, Applicant exercised its right to a hearing to contest this determination under 34 C.F.R. § 401.23 (2012) by submitting a request dated June 10, 2013.

Upon receipt of the request for a hearing, the case was assigned to the Office of Administrative Law Judges, which issued a Notice of Receipt of Application for Review and an Order Governing Proceedings (OGP) on June 12, 2013.<sup>2</sup> The Notice of Receipt of Application for Review required the parties to file a Notice of Appearance, designating a representative of record for purposes of the appeal. The Department and Applicant both responded with their respective Notices of Appearance on June 12, 2013.<sup>3</sup> The OGP required the Assistant Secretary for Vocational and Adult Education (Assistant Secretary or the Department) to produce, on or before June 20, 2013, *inter alia*, the complete application submitted by Applicant, including all attachments; all documents, memoranda, etc. which set forth the criteria or standards (formal or informal) used or relied upon by each reader in assessing the application; a complete set of the reviewers' comments and scoring record; and the basis on which the Secretary denied funding the application for the grant in question. Thereafter, the OGP required Applicant to submit its objections<sup>4</sup> to the score assigned to the application and to the procedures employed by the Department to arrive at Applicant's score, on or before July 9, 2013.

The Assistant Secretary timely responded to the Order. However, Applicant failed to file any submission by July 9, 2013. On July 10, 2013, the Assistant Secretary filed a Motion to Dismiss Applicant's request for a review. On July 17, 2013, this tribunal issued a Show Cause Order that required Applicant to file a response that included a justification for missing the deadline provided in the Order Governing Proceedings and to articulate its objections to the final score and the rating process, as required under paragraph 2 of the OGP. This response was filed on Wednesday, July 24, 2013, and this tribunal accepted it as timely.<sup>5</sup> Upon receipt of Applicant's filing, this tribunal issued an order with the following deadlines: the Department shall respond by August 2, 2013 to Applicant's explanation as to why it missed the deadlines set forth in the OGP and then file its response under paragraph 3 of the OGP on or before August 12, 2013. The Department filed the Assistant Secretary's Response to Appellant's Explanation for

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<sup>2</sup> These documents were sent by facsimile by this tribunal to the then-named representatives of record: Gov. George Rivera (for Pojoaque) and Daphna Krim (for the Department).

<sup>3</sup> The Pueblo of Pojoaque named six individuals as representatives in its Notice of Appearance. On June 13, 2013, this tribunal responded to Pojoaque's Notice of Appearance by email, clarifying: "The intent of the notice of appearance is for your organization to designate one individual as the point person to receive future submissions by the Department, orders by myself, and for me to call if necessary to arrange for a conference. This does not preclude the others from participating in the process." In response, Vernon Lujan, presumably acting on behalf of Governor Rivera, sent an email naming Lt. Governor Joseph Talachy as Pojoaque's representative of record.

<sup>4</sup> Paragraph 2(b) of the Order Governing Proceedings states that the Applicant shall file: "Each objection and the basis therefor (with an appropriate citation to Applicant's application, the reviewer's comment, etc.) to the score assigned to the application. The failure to include the appropriate citations will result in the dismissal of the objection..."

<sup>5</sup> The response was filed by facsimile at 5:44 pm on Wednesday, July 24, 2013 but not received by the tribunal until the afternoon of Thursday, July 25, 2013 due to a handling error. In the morning of July 25, 2013, this tribunal issued its decision terminating Applicant's appeal on the basis of its failure to comply with the Show Cause Order. This decision was subsequently rescinded when the tribunal became aware of Applicant's response, which was deemed timely.

Missing Its Filing Deadline on August 2, 2013.<sup>6</sup> In response, on August 5, 2013, Applicant filed Pueblo of Pojoaque's Reply to the Assistant Secretary's [*sic*] Response to Appellant's Explanations for Missing its Filing Deadline.<sup>7</sup> The Department then filed the Assistant Secretary's Memorandum in Response to Appellant's Memorandum on the Merits on August 12, 2013.<sup>8</sup>

In its Response to Order to Show Cause and Memorandum<sup>9</sup>, Applicant explains its failure to adhere to the deadlines provided in the Order Governing Proceedings, cites objections to six sections of the application score – need for project, significance, quality of project design<sup>10</sup>, quality of project services, quality of project management plan and quality of project evaluation plan – and proffers an equitable argument in support of funding for the project.

As to its explanation failing to comply with the deadlines in the Order Governing Proceedings, Applicant states that it never received the Order nor the Assistant Secretary's Motion to Dismiss.<sup>11</sup> Pojoaque confirms that it received the Notice of Receipt of Application for Review on June 12, 2013 and responded in a timely manner by filing its Notice of Appearance. However, Applicant ostensibly claims it did not receive any subsequent orders or filings until the Order to Show Cause was issued and received on July 17, 2013. Accordingly, Pojoaque cites "excusable neglect" for failing to respond to the tribunal's Order. Applicant states that the office responsible for the grant (and, presumably, this appeal) is located approximately one and a half miles from the office that is officially designated as the "point of contact" for all correspondence, which receives a significant variety and volume of mail daily.<sup>12</sup> Pojoaque claims that, had the documents been received by the office of record (that of the Governor or Lieutenant Governor), they were either misplaced or erroneously delivered but that they were never received by the grant office or the museum director. For this reason, Pojoaque claims excusable neglect and asks that the tribunal consider the appeal on its merits.

In response, the Department argues that Pojoaque has not provided reasonable justification for its failure to adhere to the deadlines in the Order Governing Proceedings and proffers five arguments supporting its position. First, the Department states "the ALJ's certificate of service shows that the ALJ served his Order Governing Proceedings on Pojoaque"

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<sup>6</sup> Hereafter, the "Assistant Secretary's Response to Appellant's Explanation for Missing Its Filing Deadline" shall be referred to as "ED First Resp."

<sup>7</sup> In its Response on the Merits, the Department notes correctly that Pojoaque's Reply filed on August 5, 2013 was not provided for in the tribunal's Order Governing Proceedings or subsequent scheduling order and requests that the Reply not be admitted into the record. This tribunal will not consider Pojoaque's Reply.

<sup>8</sup> Hereafter, the "Assistant Secretary's Memorandum in Response to Appellant's Memorandum on the Merits" shall be referred to as "ED Second Resp."

<sup>9</sup> Hereafter, "Pueblo of Pojoaque's Response to Order to Show Cause and Memorandum" shall be referred to as "Pojoaque".

<sup>10</sup> In its appeal, Applicant mislabels this section "Quality of the project". (Pojoaque, p. 5)

<sup>11</sup> Notably, Applicant omits any mention of the Department's first filing (including the full application and reviewers' evaluations), which was due on or before June 20, 2013 and received by this tribunal on June 20, 2013.

<sup>12</sup> In the initial appeal, Governor George Rivera was the representative of record, and it was to him that the Notice of Receipt of Application for Review and the Order Governing Proceedings were sent by this tribunal. Subsequently on Jun 13, 2013, Pojoaque filed its Notice of Appearance, which designated Lt. Governor Joseph Talachy as the representative of record. This designation remained in effect until on July 26, 2013 when Applicant filed a second Notice of Appearance stating that Vernon G. Lujan would represent the Pueblo of Pojoaque in the proceeding. Most recently, on August 20, 2013, Pojoaque filed a third Notice of Appearance designating Steffani A. Cochran, Esq., Chief General Counsel in the Pueblo of Pojoaque Legal Department, as Pojoaque's representative of record.

and concludes that service was proper. This tribunal concurs. Indeed, Pojoaque does not claim that service was improper. The Department's statement is unilluminating.

Second, the Department argues that Pojoaque's claim that the Order Governing Proceedings and other documents were not delivered to the "proper parties" is misplaced and factually incorrect. Pojoaque states that although the OGP and Motion to Dismiss may have been received by the Governor's office, they seem to have been "either misplaced, or erroneously delivered to the wrong party. Regardless, they were never received by the proper parties, because had they been they would have been responded to in a timely manner." (Pojoaque at 2-3) The Department responds that the Order Governing Proceedings was served "on the proper party at Pojoaque" because it was sent to the Office of the Governor, who was the representative of record at the time. Because he was so designated, the Governor's Office was the proper party for receipt of all correspondence and materials related to this appeal, and whether or not these materials were forwarded internally to the grant office or others is "entirely irrelevant to the issue of service on and receipt by Pojoaque." (ED First Resp., p. 5)

This tribunal concurs with the Department that the Office of the Governor was the proper party at the time for receipt of all materials related to Applicant's appeal, and any suggestion that delivery elsewhere was required for service to be proper is incorrect. Applicant's argument that the lack of proximity between the Office of the Governor and the offices of those handling the grant hampered the proper delivery of the OGP is without merit. Indeed, when materials have been received at the address (or phone number or email) specified on the Notice of Appearance naming the party representative, then service has been properly executed.<sup>13</sup> Further, this tribunal notes that Applicant does not state categorically that the office designated in the Notice of Appearance (the Office of the Governor) never received these materials, only that they were never received "by the proper parties." Indeed, Applicant allows for the possibility that the documents were received by the Office of the Governor but delivered to "the wrong party". With this language, Applicant indicates that it believed the "proper parties" to be someone other than the Office of the Governor. As discussed above, this belief is mistaken, and whether or not the OGP was delivered to the grant writer or museum director is immaterial. Further, while Pojoaque may be adamant that the OGP and Motion to Dismiss were never received by the grant office/museum director, Applicant does not specifically address whether the documents were delivered to the Office of the Governor, which is the relevant consideration. For this reason, Applicant's argument is unavailing.

Third, the Department argues that Pojoaque had actual notice of the Order Governing Proceedings, as demonstrated by the Department's June 20<sup>th</sup> evidentiary filing. Not only were these materials submitted in response to and in compliance with the Order Governing Proceedings, but the documents contained therein also reference the OGP in no fewer than four places.<sup>14</sup> The Department offers evidence of the receipt by Pojoaque of these materials on June 21, 2013 and argues that they provided actual notice to Applicant of the timeframes in the OGP.

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<sup>13</sup> To be clear, for service to be proper and legally sufficient, it must be received at the address designated in the Notice of Appearance, in the required format, and delivered in accordance with the regulations.

<sup>14</sup> The Department states and this tribunal confirms that three references to the OGP were included in the cover letter accompanying the evidentiary submission, and the email message, to which portions of the evidentiary submission were attached, referenced the Order Governing Proceedings and/or the "ALJ's Order" three times as well.

Nothing in Applicant's Memorandum or argument of excusable neglect addresses the Department's point.<sup>15</sup> Accordingly, it is deemed as conceded by Pojoaque. The Department's proffered evidence of Pojoaque's receipt of the former's June 20<sup>th</sup> evidentiary filing is unrefuted and irrefutable. It is clear that Pojoaque had actual notice of the Order Governing Proceedings no later than June 21, 2013, more than two weeks before its response was due. Pojoaque ignored this information at its own peril and to its own detriment.

Fourth, the Department argues that Pojoaque's failure to inquire about the Order Governing Proceedings, which was to be "issued shortly", was unreasonable and cannot be attributed to "excusable neglect". The Department states that Pojoaque, knowing that the OGP was to be issued imminently, had an affirmative duty to make inquiries -- both with the tribunal and the Office of the Governor -- about the Order. That it failed to do so for more than a month, especially give the short timeframes outlined in the regulations (as cited in the Notice of Receipt of Application for Review), is unreasonable. Further, the Department argues that "a failure on the part of Pojoaque's Governor's office or his staff to properly handle the ALJ's Order once received, or the absence of adequate procedures in the Governor's office, whereby important documents may be handled properly and expeditiously, should not be viewed as excusable neglect." (ED First Resp. at 9) Thus, the Department urges this tribunal to reject Applicant's argument of excusable neglect.

Excusable neglect is generally understood to be a legitimate excuse for the failure of a party or his or her lawyer to take required action on time. Excusable neglect, as asserted by Pojoaque here, refers its failure to file its pleadings due to the error resulting in its not receiving the Order Governing Proceedings. This tribunal infers that Pojoaque believes it should be excused from missing its filing deadline because it continued to wait for the Order Governing Proceedings to be issued rather than take any affirmative steps to inquire about it after some time had elapsed.

This tribunal has consistently rejected excusable neglect as an explanation for a party's failure to file an appeal within the regulatory or statutory timeframes. *See, In re Cheyenne River Community*, Dkt. No. 97-13-O, U.S. Dep't of Educ. (Feb. 26, 1997) and *In re Nisqually Indian Tribe*, Dkt. No. 97-14-O, U.S. Dep't of Educ. (Feb. 28, 1977). However, these prior cases can be distinguished from Pojoaque in that the applicants in those cases failed to adhere to the 30-day regulatory deadline for requesting review of a non-award decision. In this case, Pojoaque timely filed its request for a review but failed to adhere to deadlines ordered by this tribunal. There was no regulatory or statutory infraction. Had Pojoaque contravened the regulations, it would have been afforded little latitude. However, the consequences of Pojoaque's failure to adhere to this tribunal's deadlines fall within the discretionary consideration of this tribunal, which establishes the rules and conduct of the hearing in accordance with 34 C.F.R. § 401.23 (2012). This tribunal concurs with the Department that Pojoaque had an affirmative obligation to inquire about the ongoing proceedings once it had received the Notice of Receipt of Application for Review but nothing further. This lapse notwithstanding, this tribunal is persuaded that Pojoaque has acted in

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<sup>15</sup> Further, nothing in the Pueblo of Pojoaque's Reply to the Assistant Secretaries' [sic] Response to Appellant's Explanations for Missing Its Filing Deadline, submitted on August 5, 2013, addresses the issue of actual notice provided by the Department's evidentiary filing on June 20, 2013. Indeed, Pojoaque does not mention the Department's evidentiary filing in any of its pleadings. Clearly, however, these materials were received by Pojoaque at some point, as evidenced by Pojoaque's filing of its objections to the readers' scores.

good faith, having requested the appeal and responded to the Notice in a timely manner. Further, this tribunal believes that the delay in the proceedings was not prejudicial to and did not unfairly burden the Department and that the potential harm to Applicant by not having its appeal heard on the merits outweighs any harm that the Department may suffer due to the delay. For the forgoing reasons and considering the totality of these unique circumstances, the tribunal, exercising its authority under 34 C.F.R. § 401.23(b), will hear the appeal on the merits.

### **Standard of Review**

It is well-established that the role of the tribunal in this appeal process is to review the initial grant evaluation process for significant error and not to reevaluate the merits of the application and supplant the judgment of the reviewers. *In re Iowa Tribe of Okalahoma*, Dkt. No. 01-17-O, U.S. Dep't of Educ. (July 24, 2001). Further, this tribunal has consistently found that the various scores determined by each reviewer shall not be adjusted absent significant error. *In re Sisseton Wahpeton*, Dkt. No. 95-86-O, U.S. Dep't of Educ. (Aug. 7, 1995). Such a standard recognizes that reasonable persons may differ in their evaluations and yet permits correction in the event of significant error. *Iowa Tribe*. In order for a score to be amended, significant error must be demonstrated to have existed at the time of the initial grant application review and based on information that was available and presented to the reviewers. Information and data introduced subsequent to the initial grant review process will not be considered by this tribunal. *See, In re Mescalero Apache Tribe*, Dkt. No. 97-10-O, U.S. Dep't of Educ. (April 1, 1997); *In re Washoe Tribe of Nevada and California*, Dkt. No. 01-16-O, U.S. Dep't of Educ. (July 24, 2001); *In re Round Valley Indian Tribe*, Dkt. No. 07-20-O, U.S. Dep't of Educ. (Aug. 2, 2007). Furthermore, this tribunal has consistently required applicants to state with specificity their objections to the scores received. As provided in paragraph 2(b) of the Order Governing Proceedings, the Applicant must identify the score to which it has objections, articulate the objections and state the basis of each objection (with an appropriate citation to Applicant's application, the reviewer's comment, etc.). Absent specificity, the tribunal will not speculate as to the basis for any assertion, nor will the tribunal accept vague and unsupported objections. *In re Miccosukee Corporation*, Dkt. No. 97-09-O, U.S. Dep't of Educ. (March 24, 1997). The failure of the Applicant to explain how the complained of circumstance affected its score will render its objections meaningless and without substance. The lack of appropriate citations will also result in the dismissal of the objection.

### **Discussion**

In its appeal, Pojoaque does not take issue with the process by which grant applications were reviewed. Its objections focus on the substance of the evaluation criteria and the scores assigned by the readers. The Department responds with several arguments to leave intact the reviewers scores. First, the Assistant Secretary states that its process for selecting grant recipients under this competition was fundamentally sound. Second, the Assistant Secretary argues that Pojoaque failed to demonstrate there was any significant error in the readers' scores. Third, the Assistant Secretary maintains that Applicant's objections are vague, unsupported and insufficient to warrant disturbing the readers' scores or the Department's decision.

#### 1. Need for Project

The first objection raised by Applicant is in the category “Need for Project” (5 points). Pojoaque received scores of four, three and three from Readers A, B and C respectively, which is considered adequate. Pojoaque objects to the stated weakness, cited by all three reviewers, that the data it provided was not current. Specifically cited were the 1995-2000 Strategic Plan, information from the 2000 Census, and unemployment data from 1999 and 2000. Pojoaque objects to these criticisms by stating that the statistics used were the most current available at the time the application was written. Regarding the Strategic Plan, Pojoaque argues that it is still relevant to the project because it focuses on traditional arts, which do not change significantly over time. Applicant also notes that a new Strategic Plan for 2015-2020 is currently under formulation. For these reasons, Pojoaque objects to its score in this category.

The Department responds that Pojoaque did not present “convincing evidence of need to warrant a full score” in its application. (ED Second Resp. at 9) It reiterates as problematic Pojoaque’s reliance on data from the 1980s, 1990s and the 2000 Census. Further, the Department contends that Pojoaque could have provided more recent data and that its argument that the information was the most current available at the time the application was written (February/March 2013) “strains credulity in light of the host of publicly available data and information”. (*Id.* at 10) The Department then cites several government entities, both state and federal, which compile and provide current information on unemployment trends, economic conditions and demographics. Finally, the Department dismisses Applicant’s statement that a new Strategic Plan is currently under development as irrelevant because it is new information that was not included in the application to explain the use of the older data.

Upon review of Pojoaque’s application in light of the objections to the score, this tribunal notes that the data cited is seven to 25 years old. In particular, Pojoaque relies upon data, disaggregated to the Pueblo level, from the 2000 Census for employment-related statistics and 2006 Census data for the educational profile. The Department counters Pojoaque’s claim that more current information was not available at the time of the application by providing several links to public websites. However, upon review of the information provided by the Department, this tribunal notes that the sources provided are general citations to the Department of Labor and the Census, not links to specific information about the various Pueblos in New Mexico. The data sources that the Department references may be disaggregated to the county level (or “county equivalents”), but this information is not equivalent to the Pueblo-level data provided by Applicant. Indeed, county-level data would not be useful or relevant to this application because the Pojoaque Pueblo is located in Santa Fe County, NM, which includes a larger urban population, skewing any unemployment statistics relative to the Pueblo population. In sum, the Department does not refute Pojoaque’s claim that more current data was available with the information it provided in its Second Response.

However, the reviewers’ criticism that more recent data should have been provided nevertheless has merit. In its application, Pojoaque relies extensively on 2000 Census data. If Applicant was able to find data from the 2000 Census disaggregated to the Pueblo-level, then Pojoaque knew or should have known that the same information from the 2010 Census would likely be available.<sup>16</sup> For this reason, Pojoaque’s objection has insufficient basis for disturbing the reviewers’ scores for this criterion.

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<sup>16</sup> Indeed, this tribunal was able to locate such information on the Census website.

## 2. Significance

The second evaluation criterion is the significance of the project; it has a maximum value of 15 points. This criterion has three parts, each part assigned five points, and addresses whether the proposed project increases an awareness of the educational needs or strategies for providing career and technical education, whether the proposed project will result in a change or improvement in the educational program, and whether the proposed project is likely to expand the services that address the career and technical needs of the American Indian population in Northern New Mexico and elsewhere.

Readers A and C assigned the maximum score of 15. B assigned a score of 11 of 15 points which is in the range of the high end of adequate. B awarded the maximum of five points for the second part and three points each for parts 1 and 2.

Under the first part, the plan must specify how the project will increase the understanding by others of the need for the project. Reader B noted that Pojoaque's project does not include such information and scored the criterion accordingly. Pojoaque's objection to this score consists of a general description of how the project impacts potential employment opportunities. The Department asserts that the stated criterion is not specifically addressed in the application, so the objection is neither reasonable nor convincing. The tribunal agrees. Pojoaque's objection is not tied to the reader's comments, nor to any section of the application and is therefore without substance. Accordingly, Reader B's score stands.

The second part received the maximum score from all three readers.

The third part of the application should address the extent that the project will provide, improve, or expand local services that address the career and technical needs of plan. As a strength, B noted that the project proposes to use an intergenerational teaching methodology which theoretically builds local capacity and can be interpreted as meeting the career and technical education needs of the target population. As a weakness, B indicated that—

the application does not specifically respond to this selection criteria with information regarding its existing capacity and how the proposed project builds on this capacity [and] therefore it is difficult to assess if the project actually builds local capacity without making broad assumptions about the intent of the project activities.

(Reviewer B Technical Review Forms with Comments and Scores, p. 4<sup>17</sup>)

On brief, Pojoaque suggests that the exhibition training and the entrepreneurial training aspects of the program will provide students with increased “experiential training opportunities to engage in sales, compete for exhibition opportunities, and professional development throughout their artistic careers.” (Pojoaque at 5) The Department asserts that the information provided by Pojoaque concerns previous projections, which are irrelevant to the current evaluation. Upon review, this tribunal believes that Reader B's comment has merit, and

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<sup>17</sup> Hereafter, all “Technical Review Forms with Comments and Scores” shall be referred to as “Reviewer A”, “Reviewer B” or “Reviewer C” as appropriate.

Pojoaque does not demonstrate that the reader committed a significant error in its rating. Accordingly, the rating remains unchanged.

### 3. Quality of Project Design

The quality of the project design criterion is worth a maximum of 25 points. Readers A, B, and C awarded 22, 17, and 25 points respectively, which reflect ratings from the high end of adequate to excellent. This criterion has four parts, of which the first part is worth a maximum of 10 points, and each of the remaining three parts is worth a maximum of five points.

For the first part, two readers, A and C, assigned the maximum score, while Reader B gave Pojoaque eight. This criterion considers the extent to which objectives and goals of the project are specified and measurable and cites various factors to be considered, such as student career and technical education activities, identification of the requirements for each course of study, technical skill proficiencies to be taught, etc.

Reader B, the only evaluator who did not award full points in this subcriterion, wrote as a weakness that—

the proposed computer courses are supposed to support entrepreneurship and online sales however the courses are described as Geographic Information Systems (GIS) which require an advanced understanding of computer applications and databases for a population the applicant describes as needing basic skills; the applicant further describes how these courses are used for Natural Resource Management which is a purpose that is not related to the project's stated objectives.

(Reviewer B at 5)

Thus, Reader B cites this disconnect between the course being taught (*i.e.*, Geographic Information Systems) and the stated program goals of entrepreneurship and online sales as being the sole weakness under this section. For this reason, Reader B gave Pojoaque two points less than the maximum score.

On appeal, Pojoaque describes the Computer Literacy Basics class<sup>18</sup> that is part of its curriculum and explains how an understanding of the various software programs taught in this course enhances the students' "employment readiness". In response to Reader B's criticism, Pojoaque also explains the relevance GIS training for students and suggest other tribal uses for this equipment and training. (Pojoaque at 6-7)

In its response, the Assistant Secretary asserts that Pojoaque fails to address Reader B's statement of the application's weakness and characterizes Pojoaque's objection as introducing "new and historical information" that is not only irrelevant, but which was not included in the application. (ED Second Resp. at 13)

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<sup>18</sup> This course is described as an introduction to personal computer hardware and Windows OS based software, using Windows Office Suite, Internet Explorer and Windows 7. Students are taught to create office documents, basic spreadsheets, PowerPoint presentations, and various publications. (Pojoaque at 6)

Upon review of the application in light of Reader B's comment, this tribunal believes that the reader failed to consider information in the application that is central to this criterion. In particular, this tribunal notes that the application, section A(3) describes in detail the various curricula taught through this project, including coursework in "computer technology training". According to the description in the application, students are required to become knowledgeable in the following areas: familiarity with hardware; keyboarding; familiarity with software; Microsoft Office software (MS Word, MS Excel, MS Access, and MS Publisher); desktop publishing software and Adobe Photoshop XE. (Pueblo of Pojoaque Application, p. 7<sup>19</sup>) This section clearly describes instruction provided to enhance the students' computer skills in support of their required entrepreneurial training coursework<sup>20</sup> and mirrors Pojoaque's objection to Reader B's score. Thus, Reader B is incorrect that Pojoaque does not detail the basic computer training its students would need to develop and exercise their business skills. The Department's assertion that this information is new and not contained in the application is also incorrect. Accordingly, this tribunal believes Reader B's stated weakness to be unfounded and finds a significant error in the score. Given that this was the reader's only criticism of this section, this tribunal awards Pojoaque two points to Reader B's score for this subcriterion, for a total of ten.

The second part requires no discussion since all readers awarded the maximum points.

In the third part, an applicant addresses the extent to which the design for implementing and evaluating the project plans for and is likely to result in the development of information to guide possible dissemination of project practices, activities, or strategies, including information about the effectiveness of the approach or strategies employed by the project, a description of the planned activities, the kind of practices, activities, or strategies to be disseminated, the target audience for the dissemination of such practices, activities, or strategies, and the proposed uses for such disseminated practices, activities, or strategies.

The maximum number of points under this part is five. Readers A, B, and C awarded two, zero, and five points respectively. Reader A noted as strengths that there is evidence of the success of this project in the past as it was the subject of a book and that there is a formal linkage with a tribe in Brazil. However, Reader A adds that there is no current plan for the dissemination of information. There is also no articulated plan that would result in the development of information to guide possible dissemination of the project practices, activities or strategies. (Reviewer A, p. 6) Reader B remarked that the applicant fails to present information as to how it plans to document best practices and disseminate findings that result from this work. (Reviewer B at 6) Reader C awarded full points for this section.

On appeal, Pojoaque focuses upon the success of a 1996 book that was a case study of the founding and development of its Poeh Cultural Center and Museum, including an art education component. Pojoaque states that this book has been and continues to be disseminated and used by tribes nationally and internationally.

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<sup>19</sup> Hereafter, the "Pueblo of Pojoaque Application" shall be referred to as "Application".

<sup>20</sup> All students are required to complete entrepreneurial training to graduate from the program. The Arts Entrepreneurial training evaluates students in the following areas: cultural relevancy of business; copyright and trademark laws; personal and production goals; portfolio, artist's statement and biography; business cards; entrepreneurial skills; legal requirements (taxes, payroll); organization (proprietorship, partnership, corporation); budgeting, capital; business plan development; marketing; and promotion. (*Id.*)

In response, the Assistant Secretary underscores Reader A's weakness statement that there is no current plan for dissemination of information and Reader B's comment that Applicant does not present information about how it plans to document its best practices and disseminate the findings from the project. (ED Second Resp. at 14) Thus, the Department emphasizes the two readers' focus on Pojoaque's failure to describe any current plans for the proposed project.

Although this criterion addresses what the current proposed project intends to document and disseminate, this tribunal notes that Pojoaque describes the effectiveness of its culturally-sensitive, intergenerational teaching model, as evidenced by its continued dialogue with other indigenous peoples working to preserve their cultures. This linkage is not well-described in the application. However, this tribunal believes that Pojoaque's application demonstrated some activities that address the criteria under part 3. Accordingly, Reader B's score of zero is in error. This tribunal adjusts Reader B's score by adding one point, for a total of one point under this section. The scores of Readers A and C are upheld.

In part 4, Readers A and C awarded the maximum of five points and Reader B awarded four points. Pojoaque did not challenge the determination by Reader B. Hence, there is no need to address this part.

#### 4. Quality of Project Services

The quality of the project services section is worth a maximum of 20 points. This criterion has three parts. The first part (5 points) addresses the training or professional services to be provided the project staff and instructors and questions whether it is of sufficient quality, intensity, and duration to lead to improvements in their services, whether the training and development plans clearly address any learning gaps and how continuous review of performance will be conducted to identify training needs. The second part (5 points) concerns the extent to which the proposed project will create opportunities for students to receive an industry-recognized credential, become employed in high skill, high wage, and high demand occupations, or both. The third part (10 points) examines the extent to which the project services will provide students with opportunities to acquire technical skill proficiencies, industry certifications, or the skills identified by State or industry-recognized career and technical education programs or professions. Here, there must be a clear link between the services and the skill proficiencies, industry certifications, credentials, certificates, or degrees that students may earn.

Readers A, B, and C awarded scores of 15, 15, and 18 points out of a maximum of 20 points respectively. These scores correspond to a rating of good to the low end of excellent. Readers A and B assigned the maximum points for the second and third parts. They awarded zero points for part 1, noting that the application did not include professional development for the staff.

On appeal, Pojoaque makes a general objection that points were deducted from its score despite the application adequately addressing the issue. Pojoaque supports its argument with a discussion limited to one short paragraph that directs the tribunal to read 15 pages of the application that contain narrative concerning approximately 20 subjects.

In response, the Assistant Secretary contends that Pojoaque “fails to identify any specific objections or bases for questioning the reviewer scores”. (ED Second Resp. at 15) Further, Pojoaque has presented no information to suggest that the reviewers’ scores were inappropriate.

This tribunal concurs with the Assistant Secretary and finds Pojoaque’s objection to be non-specific and unfounded. It is clear that the readers assigned zero points in part 1 because the application failed to include a proposed training and professional development plan for the staff. Pojoaque’s reference to matters other than this type of development is simply irrelevant. As such, the point awards by the readers are upheld.

#### 5. Quality of the Management Plan

The quality of the management plan has a maximum value of 15 points. This criterion has three parts, each part assigned five points. The first part addresses the adequacy of the management plan to achieve the objectives of the project on time and within budget, including clearly defined responsibilities, timelines, and milestones and performance standards. The second aspect of the quality of management plan requires an assessment of whether the time commitments of the key project personnel are appropriate and adequate to meet the objectives of the proposed project. The third component of the management plan is whether there are adequate mechanisms for ensuring high-quality products and services from the proposed project.

Each reader assessed the quality of Pojoaque’s management plan as an eight out of a possible 15 points. This score reflects a rating at the low end of adequate. All three readers gave the maximum score of five points on part 2, leaving parts 1 and 3 in dispute.<sup>21</sup> Readers A and B concurred, both awarding part 1 a rating of three of five points and zero out of a possible five points for part 3.

As weaknesses for part 1, the readers noted there was no discussion of the budget and its relationship to the outcomes; there were no timelines, milestones, or performance standards; and it was unclear how the two advisory boards will guide the project and their respective responsibilities, especially in light of the control over the proposed project by the Tribal Council.

As a weakness under part 3, the readers observed that the management plan did not detail any mechanisms for ensuring the quality of the products and services, including any mechanisms for providing the purported outcomes in business and technical areas, where the project does not offer any targeted training for those areas.

In its Memorandum, Pojoaque generally objects to the score, stating that the details of the management plan are “interspersed through the proposal and detailed on pages 27-29.” (Pojoaque at 10) Pojoaque then devotes three paragraphs to address the readers’ criticisms in general terms.

The Assistant Secretary responds that the information in Pojoaque’s application lacked sufficient detail to merit the full points available in this section. Further, the Assistant Secretary

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<sup>21</sup> While Reader C did not break down his/her overall score of eight into its three components, it is apparent from the absence of any weakness cited for the second part that he/she awarded a maximum score of five points for the second part.

argues that Pojoaque's objections and supporting arguments are not relevant to the quality of management plan criteria as stated.

This tribunal concurs with the Department and finds that Pojoaque's objections lack specificity, as do its supporting arguments, which fail to address the problems noted by the readers. Accordingly, the readers' scores will remain unchanged.

#### 6. Quality of the Project Evaluation

The quality of the project evaluation is worth a maximum of 25 points. This criterion has five parts, each of which is assigned a maximum value of five points. These parts address whether the methods of evaluation (1) are appropriate and feasible for the proposed project; (2) use objective performance measures and GPRA (Government Performance and Results Act) performance measures and produce quantitative and qualitative data; (3) provide trustworthy data that presents an accurate picture of performance; (4) provide performance feedback on a continuous basis for improvement of the proposed project; and (5) provide quality information for an external evaluator.

Readers A, B, and C awarded scores of 16, 10, and 10 points respectively. The 10 point awards reflect a rating at the high end of inadequate, and the 16 points reflect a rating at the high end of adequate. The readers agreed that the maximum award of five points was appropriate for parts 1 and 4 and that no points should be awarded under part 2. Readers B and C concurred that no points were appropriate for parts 3 and 5, while Reader A assigned a score of four points for part 3 and two points for part 5.

Regarding part 2, which addresses the use of objective performance measures and GPRA performance measures, the readers observed that Pojoaque's methods of evaluation did not identify specific performance measures and did not incorporate the performance measures under the Government Performance and Results Act.

On appeal, Pojoaque's argument summarizes the information presented in its application. In its response, the Department summarizes the weaknesses assessed and noted by the readers, adding that Pojoaque fails to state any specific objections. This tribunal concurs with the Department and finds that Pojoaque fails to show that its methods of evaluation had specific performance measures and that it incorporated the performance measures under the Government Performance and Results Act into its plan. Hence, the scores by the readers under this part are upheld.

Under part 3, the methods of evaluation are to provide trustworthy and timely data that presents an accurate, true picture of performance. This includes the validity and integrity of data collection and analysis; accessibility of appropriate and timely data; accurate descriptions of performance; and collection processes that yield unbiased and impartial data.

As noted earlier, Readers B and C assigned a score of zero. Reader C notes that, while a list of quantitative assessment measures is provided for the project, there is no discussion regarding the qualitative data collection categories such as motivation and self-esteem as it pertains to its integrity, timeliness, and collection. In addition, C adds that Pojoaque apparently presents the use of a "Scranton" in its application as if it were an evaluation method, when in

fact, it is only a tool. In B's view, Pojoaque's application does not respond specifically to this selection criteria and the information presented within the proposal is not sufficient to determine if the stated evaluation methods address the topics of validity, data collection and integrity, or other relevant issues.

On appeal, Pojoaque's objection is simply a statement that the proposed project will use a qualitative form to measure student achievement. The Department's response simply reiterates the weaknesses cited by the readers. This tribunal finds that Pojoaque's objection fails address the weaknesses noted by Readers C and B. On this basis, the scores assigned by Readers C and B are upheld.

Under part 5, the criterion for evaluation is the "quality of the evaluation" to be conducted by an external evaluator. Pojoaque's application mentions only that an "Exterior Evaluator" will complete a summative evaluation at the end of each project year and will recommend improvements to the staff. Reader A awarded two points out of a possible five points. Reader B and C awarded no points on the basis that the plan had no credentials or job description requirements for the external evaluator. Without this information, the readers cannot determine whether the evaluator will possess the appropriate background and expertise to conduct the assessment properly.

On appeal, Pojoaque asserts that the external evaluator will be an education specialist with a doctorate degree in education and also describes the role of the evaluator in the program. (Pojoaque at 9) In response, the Assistant Secretary summarizes the readers' comments but fails to address Pojoaque's arguments. The tribunal notes, however, that the information about the role and credentials of the external evaluator is new information that was not available to the readers and, therefore, may not be considered by the tribunal. *Mescalero Apache; Washoe Tribe; and Round Valley*.

As noted above, the position of external evaluator had no credential or job description requirements in the application. As such, the application contains no assurance that the evaluator will have the requisite background or technical expertise to perform a quality evaluation. Accordingly, the scores assigned by the readers under this part shall remain unchanged.

#### 7. Pojoaque's Equitable Argument

In its Response Order to Show Cause and Memorandum, Pojoaque includes an argument for equitable consideration of its application. It states that the program is "so unique, so compelling, so successful and so deserving of consideration by DOE that it must continue." (Pojoaque at 11). Applicant describes how the program provides an opportunity that "can be found almost nowhere in the United States on this level" and concludes that "to cease funding this program will be tantamount to eradicating the peoples themselves..." (*Id.*)

The Assistant Secretary replies that there is no equitable remedy available under 34 C.F.R. § 401.23 (2012). Requesting equitable relief ignores the reality of discretionary competitive grant programs, which have only limited funds available to award to the numerous eligible applicants. Further, the Department states that "funding an application that did not score within the funding range following a fair and objective process would not be equitable treatment of those applicants that *did* score within [the] funding range and would undermine the

Department's objective discretionary grant selection process." (emphasis in original) (ED Second Resp. at 20)

This tribunal sympathizes with Applicant's distress and dismay at failing to secure funding for its project but has no authority to award points for criteria outside those contained in the Department's Notice Inviting Applications for new awards for FY 2013 and the Notice of Final Requirements, Definitions, and Selection Criteria. For an applicant to receive funding in a discretionary grant competition, it must submit an application of sufficient detail, quality and substance to earn the necessary points to fall within the funding range. Unfortunately, Pojoaque failed to do so. On appeal, this tribunal examined Applicant's objections for significant error by the reviewing panel. To the extent that Applicant has demonstrated that its application had merit unrecognized by the readers, this tribunal awarded points accordingly.

### **ORDER**

On the basis of the foregoing findings of fact and conclusions of law and the proceedings herein, it is **HEREBY ORDERED** that the Assistant Secretary for Vocational and Adult Education recompute the final score for the Applicant, Pueblo of Pojoaque, in accordance with the above determination and determine the ranking of Applicant's application among its competitors, consistent with this decision.

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Allan C. Lewis  
Chief Administrative Law Judge

Issued: August 28, 2013  
Washington, DC

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SERVICE

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On August 28, 2013, a copy of the attached initial decision was sent by certified mail, return receipt requested and, as a courtesy by email, to the following:

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