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(APPLICATION FOR ADMISSION TO BAR OF THE COURT PENDING)

Attorneys for Plaintiff AID Atlanta, Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AID ATLANTA, INC.,
1605 PEACHTREE STREET NE,
ATLANTA, GA 30309-2955

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;**

**THOMAS E. PRICE, M.D., SECRETARY OF
THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES;**

**CENTERS FOR DISEASE CONTROL AND
PREVENTION;**

**ANNE SCHUCHAT, M.D. ACTING
DIRECTOR OF THE CENTERS FOR DISEASE
CONTROL AND PREVENTION**

Defendants.

Civil Case No. 1:17-CV-872

COMPLAINT

JURY TRIAL DEMANDED

COMPLAINT

NOW COMES Plaintiff AID Atlanta, Inc. and complains of the Defendants as follows:

I. INTRODUCTION

1. The United States Department of Health and Human Services (HHS), acting through its agency the Centers for Disease Control and Prevention (CDC), mismanaged a critical funding opportunity and impermissibly denied funding to a long-standing partner fighting HIV/AIDS in the Atlanta, Georgia area. Plaintiff AID Atlanta, Inc. (AID Atlanta) was a victim of an arbitrary and capricious funding process that will result in thousands of fewer HIV tests being performed in Atlanta and that will only worsen an ongoing public health crisis among minorities in that community.

2. For the past 14 years, AID Atlanta has provided HIV testing, education, and prevention services to the most vulnerable populations in a region disproportionately affected by the HIV/AIDS epidemic pursuant to a series of cooperative agreements with CDC. Most recently, AID Atlanta acted as a trusted and highly regarded partner under a six (6) year agreement operating HIV prevention projects targeting young men of color who have sex with men (PS11-1113). As this specific cooperative agreement moved toward an expiration date of March 31, 2017, it was replaced by a new funding opportunity announcement released in September 2016 (PS17-1704).

3. As one of the first organizations to respond to the AIDS epidemic in the Southeast, AID Atlanta, founded in 1982, has decades of experience in HIV prevention, treatment, case management and other essential services for people living with HIV/AIDS and those at risk of contracting the disease.

4. On September 10, 2016, AID Atlanta submitted a timely proposal to CDC to continue its HIV prevention programs under the new funding opportunity. AID Atlanta sought

to continue its successful efforts to provide HIV prevention services for young men of color who have sex with men (MSM), a group at especially high risk for becoming HIV-infected. In fact, MSM in the Southern United States bear the highest infection rates of any region in the U.S., and Black, gay men, especially those under age 30, have the highest infection rates of any population in the U.S.

5. As expected, AID Atlanta was informed by CDC on December 15, 2016 that its application had been reviewed by an independent objective panel and received a high enough score to move on to the second step of the evaluation process, the Pre-Decisional Site Visit (PDSV). The PDSV is a one-day site visit designed to assess the organizational, programmatic, and financial capacity of the organization to carry out the proposed program. The PDSV took place on January 18, 2017.

6. By all accounts, the site visit was well executed, and AID Atlanta was able to provide all information requested by CDC during the visit. This is not surprising given AID Atlanta's extensive history providing the specific services requested by the new funding opportunity, PS17-1704. In fact, an examination of funding opportunity PS17-1704 shows it to be substantially identical to the predecessor funding opportunity, PS11-1113. As a result, AID Atlanta has effectively been operating the exact programs addressed by PS17-1704 since at least 2011.

7. In fact, AID Atlanta has been providing HIV prevention services under various CDC cooperative agreements dating back at least to July 1, 2004 when it was awarded funds pursuant to funding opportunity PA04064. Overall, CDC has awarded AID Atlanta at least five long-term cooperative agreements for HIV prevention programs since 2004. At no time during this period has CDC expressed any concerns or criticisms of AID Atlanta's HIV prevention programs or its abilities to manage such programs and federal resources.

8. Despite such an extensive history as a successful partner, AID Atlanta was denied funding under PS17-1704 after the PDSV. On March 3, 2017, AID Atlanta received a perfunctory letter from CDC indicating that the PDSV evaluation did not rank it high enough to receive funding, plainly ignoring that AID Atlanta had demonstrated over a period of years that it excelled at operating HIV prevention programs targeted toward the very people to be served under PS17-1704.

9. The only logical conclusion to draw from the inexplicable outcome of the funding process is that CDC's decision making was arbitrary and capricious and not based on a full and fair evaluation of AID Atlanta's proposal and capabilities.

II. THE PARTIES

A) AID Atlanta, Inc.

10. Established in 1982, Plaintiff AID Atlanta, Inc. is a not for profit Georgia corporation that provides HIV/AIDS-related services, care, and education. The agency was established in response to the devastating impact that HIV/AIDS was having on gay men in Atlanta. The organization quickly expanded to engage Black and Latino populations and meet the evolving needs of the diverse community in response to the epidemic.

11. Today, AID Atlanta offers a broad range of services and has grown to be the most comprehensive AIDS service organization in the Southeast. AID Atlanta currently offers HIV/AIDS prevention and care services, including (but not limited to) Primary Care, HIV/STD Screening, PrEP, Community HIV Prevention Programs, Linkage Services, Case Management, and a state-wide Information Hotline. Its principal place of business is 1605 Peachtree Street NE, Atlanta, GA 30309.

12. AID Atlanta has been providing HIV testing, prevention and education services under cooperative agreements with CDC since at least 2004. Over the past 13 years, CDC has

awarded at least five (5) such cooperative agreements to AID Atlanta.

B) United States Department of Health and Human Services

13. Defendant United States Department of Health and Human Services (HHS) is the U.S. government's principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves. HHS is comprised of several operating divisions including the Public Health Service. The PHS in turn is comprised of multiple agencies including the Centers for Disease Control and Prevention.

14. Defendant Thomas M. Price, M.D. is the Secretary of HHS. Dr. Price is sued in his official capacity.

C) Centers for Disease Control and Prevention

15. Defendant Centers for Disease Control and Prevention (CDC) serves as the national focus for developing and applying disease prevention and control, environmental health, and health promotion and health education activities designed to improve the health of the people of the United States. As part of its mission, CDC awards grants and cooperative agreements pursuant to federal law and regulation, including pursuant to the Public Health Service Act (42 U.S.C. *et. seq.*).

16. Defendant Anne Schuchat, M.D. is the Acting Director of CDC. She is sued in her official capacity.

III. JURISDICTION, VENUE, STANDING

A) Jurisdiction

17. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this is a civil action arising under the Constitution, laws, or treaties of the United States.

18. The Administrative Procedure Act ("APA") provides a waiver of sovereign

immunity as well as a cause of action. 5 U.S.C. § 702.

B) Venue

19. Venue is proper in this district pursuant to 28 U.S.C. 1391(e)(1) because (a) Defendants HHS and Secretary Price are located in this district and (b) a substantial part of the events giving rise to this claim occurred in this district, and no real property is involved in this action.

C) Standing

20. The APA affords a right of review to a person or entity who is “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. Defendants’ arbitrary and capricious decision to deny AID Atlanta funding under PS17-1704 has adversely affected Plaintiff’s ability to operate HIV testing, prevention and education programs. In the absence of the wrongly denied funding, AID Atlanta has laid-off staff and will reduce the number of HIV tests and other services provided to the community. AID Atlanta thus falls within the APA’s standing provisions.

IV. LEGAL BACKGROUND

21. The Public Health Service Act authorizes the Secretary of HHS to make grants to States, political subdivisions of States, and other public and nonprofit private entities for, among other things, demonstration projects for the prevention and control of such diseases and conditions and public information and education programs for the prevention and control of such diseases and conditions. 42 U.S.C. 247(b)(k)(2). Similarly, the Secretary may provide technical assistance to appropriate public and nonprofit private entities and to scientific institutions for their research in, and training and public health programs for, the prevention and control of sexually transmitted diseases. 42 U.S.C. 247(c).

22. The APA creates a right of action for aggrieved parties to ensure that citizens are

free from improper decisions by federal agencies. The APA permits reviewing courts to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action, and to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

V. FACTUAL ALLEGATIONS

23. AID Atlanta has been providing HIV testing, prevention, and education services to vulnerable populations in the Atlanta, Georgia area pursuant to cooperative agreements with CDC since at least 2004.

24. AID Atlanta's most recent cooperative agreement with CDC was awarded to fund AID Atlanta "Prevention Program for Young African American Men Who Have Sex with Men." This program was funded pursuant to cooperative agreement number PS11-1113 for a period of about six years running from September 30, 2011 through March 31, 2017.

25. As the funding period related to agreement PS11-1113 drew to a close, CDC prepared to renew the program by releasing a funding opportunity announcement titled, "Comprehensive High-Impact HIV Prevention Projects for Young Men of Color Who Have Sex with Men and Young Transgender Persons of Color" (PS17-1704)." The stated purpose of PS17-1704 is to "implement comprehensive HIV prevention programs to reduce morbidity, mortality, and related health disparities among high-risk YMSM of color, YTG persons of color, and their partners."

26. Notably, the purpose of PS17-1704 remains substantially the same as the funding opportunity it replaced. CDC stated that the purpose of funding opportunity PS11-1113 was to support the development and implementation of effective community-based HIV prevention programs that serve young men of color who have sex with men and young transgender persons

of color and their partners at high risk for acquiring or transmitting HIV.

27. Both funding opportunities, PS11-1113 and PS17-1704, permit applicants to provide services under one of two categories. AID Atlanta provides services under Category A, “HIV prevention services for Young Men of Color Who Have Sex with Men (YMSM of color) and their partners regardless of age, gender, and race/ethnicity.”

28. AID Atlanta excelled at implementing “Category A” HIV programs under PS11-1113. Its 2014-2015 annual report from CDC makes this crystal clear. The CDC project officer stated that AID Atlanta “did an excellent job describing program promotion and client recruitment efforts implemented during the reporting period that have proven effective in reaching and actively engaging the target population” Moreover, all individuals who presented for HIV testing services were referred to essential support services regardless of HIV test results. In the case of high risk individuals, AID Atlanta provided immediate referral and linkage to ensure that people could access services.

29. During this example period, AID Atlanta identified 37 HIV positive individuals (35 of whom were newly diagnosed), and 34 of those newly diagnosed individuals were referred to care. AID Atlanta was similarly successful during all periods for which it received funding under PS11-1113.

30. AID Atlanta has also excelled at operating programs funded under substantially similar CDC cooperative agreements. For example, to reach populations most disproportionately affected by HIV, CDC initiated Funding Opportunity Announcement (FOA) PS15-1502, “Comprehensive High-Impact HIV Prevention Projects for Community-Based Organizations.” Similar to the other opportunities discussed above, PS15-1502 targets members of racial/ethnic minority communities at greatest risk of acquiring and transmitting HIV infection. AID Atlanta was awarded a cooperative agreement under PS15-1502 for the period running from July 1,

2015 through June 30, 2020.

31. A CDC report for the first year of operation under PS15-1502 shows that AID Atlanta exceeded the objectives placed on CBOs for newly identifying HIV positive individuals and linking those newly identified as HIV positive to care. The report also shows that AID Atlanta outperformed 64 other CBOs across the nation in regard to exceeding its objective related to newly identifying people with HIV and that AID Atlanta outperformed 40 other CBOs in regard to linking newly diagnosed individuals to care.

32. In fact, the CDC report shows that a total of 90 CBOs were awarded funds under PS15-1502. During the first year of the award, the 90 CBOs accounted for 1,019 newly diagnosed people with HIV, and of that total, AID Atlanta alone identified ***over 12%*** of all those newly diagnosed individuals.

33. Despite the ongoing CDC programs discussed above, the HIV epidemic in Georgia remains a significant public health concern. According to the CDC, Georgia ranked fifth highest in the nation for total number of adults and adolescents living with HIV infection as of 2015, a total of over 54,000 individuals. Of these, 53% had stage 3 disease, or AIDS. Among the 18 public health districts in Georgia, Fulton and DeKalb had the highest numbers and rates of persons living with HIV infection. Nearly two-thirds of persons living with HIV infection in 2015 resided in the Atlanta area — the precise area where AID Atlanta focuses its efforts.

34. The CDC further reports that 81% of those diagnosed with HIV infection in Georgia were male and that 72% of new diagnoses were among Blacks. Among newly diagnosed males, 83% were attributed to male to male sexual contact.

35. The continued need for HIV testing, prevention, and education services among minority populations in the Atlanta area is plainly evident from the grim statistics the CDC itself

releases, and AID Atlanta stands ready to continue its successful and highly regarded work under CDC's new funding opportunity pursuant to PS17-1704.

36. To that end, on September 10, 2016, AID Atlanta submitted a timely response to CDC's requests for applications under PS17-1704. AID Atlanta requested \$500,000 for each year that funding is available for programs targeted toward: HIV prevention services for Young Men of Color Who Have Sex with Men (YMSM of color) and their partners regardless of age, gender, and race/ethnicity.

37. On or about December 15, 2016, AID Atlanta received email notification from CDC that its application under funding opportunity announcement PS17-1704 received a score sufficient to be included in the second step of the evaluation process, the Pre-Decisional Site Visit (PDSV) to be conducted on January 18, 2017. The purpose of the one-day site visit is to allow CDC to assess AID Atlanta's organizational, programmatic, and financial capacity to carry out the proposed programs.

38. The PDSV took place as planned on January 18, 2017. As part of the PDSV, AID Atlanta collected certain documents requested by CDC that demonstrated AID Atlanta's capabilities to meet the obligations of the proposed programs. These documents were reviewed by CDC staff during the PDSV.

39. During the PDSV, CDC staff also met with key AID Atlanta staff including its Executive Director, the Program Manager for the proposed programs under PS17-1704, the Finance Manager, and Data Manager.

40. More importantly, at the time of the PDSV, AID Atlanta was actively engaged in providing HIV prevention services under two separate CDC awards (both PS11-1113 and PS15-1502 were ongoing in January 2017). Consequently, CDC staff were able to observe AID Atlanta's operations and financial management related to two critical awards *in real time*. As

previously addressed, the CDC itself has repeatedly noted that AID Atlanta has been exceptional in operating programs under both grant awards and that the organization has routinely outperformed its peer CBOs.

41. During the PDSV, AID Atlanta demonstrated its full capabilities to operate highly successful programs under the new funding opportunity PS17-1704. Most compellingly, AID Atlanta pointed to its extensive experience operating programs under the predecessor funding opportunity (PS11-1103) and to its ongoing relationship with CDC to provide substantially similar services under PS15-1502.

42. At no time during the PDSV did CDC indicate that the materials or meetings with key staff revealed any shortcomings or concerns related to AID Atlanta's ability to fulfill all obligations related to the proposed programs.

43. Despite the successful tenor of the PDSV, on March 3, 2017, AID Atlanta received notification from CDC that its application for funding in response to PS17-1704 was denied. The CDC noted that while the application itself scored high enough to receive a PDSV, the PDSV evaluation did not rank high enough to receive funding.

44. CDC decided not to award a cooperative agreement to AID Atlanta despite the fact that (i) AID Atlanta had been successfully providing nearly identical services under the predecessor grant program (PS11-1113) and (ii) AID Atlanta continues to provide substantially identical services under a current CDC cooperative agreement awarded under PS15-1502 and will do through June 30, 2020.

45. CDC based its funding decision entirely on the PDSV, yet during the site visit CDC was able to observe how AID Atlanta has been successfully implementing nearly identical programs stretching back many years. It is simply counter-intuitive for CDC to recognize that, on the one hand, AID Atlanta is one of the most successful CBOs in the country at

implementing HIV prevention and education programs while simultaneously finding that its operations do not rank high enough to receive funding.

46. Such cognitive dissonance can only be attributed to a flawed PDSV process that was fatally infected with arbitrary and capricious decision making.

COUNT I

(Violation of the Administrative Procedure Act)

47. AID Atlanta repeats, alleges, and incorporates the foregoing paragraphs as if fully set forth herein.

48. AID Atlanta has been aggrieved by agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et. seq.*

49. The APA empowers reviewing courts to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A).

50. Reviewing courts must determine whether an agency has “examined[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

51. The application AID Atlanta submitted in response to CDC’s Notice of Funding Opportunity PS17-1704 proposed the continuation of a highly successful program targeted toward HIV prevention services for young men of color who have sex with men and their partners regardless of age, gender, and race/ethnicity.

52. AID Atlanta has been operating substantially similar programs under CDC cooperative agreements since at least 2004 and will continue to provide other, similar HIV prevention programs pursuant to a currently ongoing agreement with CDC.

53. Notwithstanding AID Atlanta's extensive experience and long-standing relationship with CDC, Defendants denied funding to AID Atlanta under PS17-1704.

54. Defendants acted arbitrarily, capriciously, and contrary to law in violation of the Administrative Procedure Act by denying AID Atlanta funding under Funding Opportunity Announcement PS17-1704.

55. AID Atlanta has exhausted all administrative remedies available to it as of right.

56. AID Atlanta has no other recourse to judicial review other than by this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks the Court to:

A. Declare Defendants' denial of AID Atlanta's application to provide services under Funding Opportunity Announcement PS17-1704 to be in violation of the Administrative Procedure Act.

B. Order Defendant CDC to immediately award AID Atlanta a cooperative agreement budgeted at \$500,000 per year in accordance with AID Atlanta's application under Funding Opportunity Announcement PS17-1704.

C. Alternatively, order Defendant CDC to reissue Notice of Funding Opportunity PS17-1704 and re-do the entire application, review, and award process.

D. Grant attorneys' fees and costs pursuant to 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and other authority.

E. Grant any other relief the Court deems appropriate and just.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury of all issues triable.

Dated: 5/11/17

Respectfully submitted,

/s/

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