DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

10347

FILE: B-202542 DATE: June 8, 1981

MATTER OF: K.B.M. Inc.

DIGEST:

GAO will not rule on allegation by contractor that Air Force, in violation of Assignment of Claims Act, 31 U.S.C. § 203 (1976), incorrectly paid Internal Revenue Service $26,887.70 instead of contractor's assignee since contractor filed chapter XI proceeding in Federal Bankruptcy Court and court apparently has ruled on issue of who is entitled to funds and will issue decision of its opinion.

By letter of March 13, 1981, K.B.M. Inc. (K.B.M.) requested a ruling by our Office in connection with an alleged violation of the Assignment of Claims Act, 31 U.S.C. § 302 (1976), by Wright Patterson Air Force Base. K.B.M. alleges that Wright Patterson incorrectly paid $26,887.70 to the Internal Revenue Service (IRS) instead of to K.B.M.'s assignee, Southern Ohio Bank.

We were advised by the Department of the Air Force that K.B.M. filed a chapter XI proceeding in the Federal Bankruptcy Court of the Eastern District of Kentucky in Lexington, Kentucky, on February 5, 1981, and that two motions were filed under this action to resolve the question of entitlement to the funds in question. We were advised by the clerk of the court that arguments on the motions were held on May 12, 1981, but that the court has not yet released the written text of its ruling.

It is the policy of this Office not to decide issues which are before a court of competent jurisdiction unless, of course, the court requests, expects

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or otherwise expresses an interest in our decision, which it has not done in the present case. Since the court apparently will make a ruling concerning entitlement to funds in question, it would not be appropriate for our Office to interject itself, through an unsolicited decision, in the currently ongoing judicial proceeding. See Hudspeth Sawmill Company, B-195810, March 7, 1980, 80-1 CPD 181.

In the circumstances, our Office must decline to consider K.B.M.'s request for ruling on this matter.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

B-200140

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200140 DATE: June 8, 1981

MATTER OF: Johnson & Wales College

05364

DIGEST:

1. Literal interpretation of present wording of Department of Defense Directive concerning voluntary educational programs does not necessarily exclude possibility that service involved may prescribe criteria for selecting educational institutions in excess of "minimum criteria" prescribed in Directive since listing of "minimum criteria" in Directive is preceded by phrase "include the following" which admits possibility that other criteria may be specified as appropriate.

2. Regional accreditation requirement is definitive responsibility criterion, compliance with which is prerequisite to contract award; however, there need not be literal compliance with criterion.

3. Exclusion of business college, accredited nationally by Association of Independent Colleges and Schools, from consideration for Navy basic skills courses on basis that national accreditation is not equivalent to specified "regional accreditation" is questioned since: (1) contract courses are to be given on noncredit basis; therefore, wider opportunities for transferring credit among regionally accredited schools is not sound reason to exclude nationally accredited college; (2) both nationally and regionally accredited schools are apparently subject to peer review; and (3) educational experience and background of protester--including receipt of Army contracts for similar courses--suggests protester has submitted enough evidence to show compliance with criterion.

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Johnson & Wales College (J & W) protests the award of a Navy contract to Bellarmine Preparatory School for the teaching of "Basic Educational Skills" courses (reading, English grammar, composition and mathematics) under request for proposals (RFP) No. N00612-80-R-0282, issued by the Department of the Navy, Naval Supply Systems Command (Navy). Paragraph C 300, Contractor Qualifications, required that the proposed contractor have "Accreditation * * * by a regional accrediting association." J & W's low offer to teach the courses, which were to be given on a noncredit basis, was eliminated from consideration for award because, although the college has "national accreditation," it does not have regional accreditation. Based on our review, we sustain J & W's protest.

The Basic Educational Skills Program, now called Functional Skills Program, is an on-duty training program. Its "primary objective is to provide training in functional skills that will enhance military competency." The Department of Defense (DOD) has set forth guidelines for educational programs which are found in DOD Directive 1322.8, dated February 4, 1980. DOD Directive 1322.8 provides that the various military departments shall establish educational programs to provide opportunities for military personnel to achieve educational, vocational and career goals. In addition, it provides Guidelines for Voluntary Educational Programs, which includes basic skills as well as other programs. Paragraph "H" of the Directive also establishes "minimum criteria" in selecting "postsecondary civilian educational institutions" to provide these programs.

The Navy admits that J & W meets the stated minimum criteria--including the criterion requiring appropriate accreditation by an "agency recognized by the Council on Postsecondary Accreditation and the Department of Education"--given J & W's accreditation as a "Senior College of Business" by the Association of Independent Colleges and Schools (AICS). Similarly the Navy admits that J & W meets the minimum criteria in selecting civilian educational institutions under its own pertinent regulation--"OPNAV Instruction 1500.45 A," August 15, 1980. Nevertheless, the Navy argues that it properly established a requirement for regional accreditation for this procurement and that J & W's

national accreditation simply is not equivalent to the regional accreditation requirement.

The Navy advances several reasons in defending its regional accreditation requirement and the rejection of J & W's low offer. These reasons are briefly summarized as follows:

(1) The DOD Directive and "OPNAV Instruction" provide only minimum requirements; additional requirements, such as the one for regional accreditation, may be specified as appropriate without contradicting the Directive or Instruction;

(2) Regional accreditation ensures "peer group" evaluation;

(3) Regional accreditation affords the possibility that an enlistee may "apply for and receive credit" for any courses at the "huge majority" of colleges which are regionally accredited. If successful, the credit transfer will "alleviate the necessity [of the enlistee's taking a] fully funded [paid 100 percent by the Government] off-duty high school completion program;" moreover, this credit possibility "should encourage diligent participation in the basic skills courses;"

(4) J & W is accredited to teach a "specific occupational skill"--business; however, the functional skills program is a "general studies program;"

(5) Regional accreditation is desired for Navy basic skills programs because Navy enlistees are "at least elementary school graduates, and have completed or have some high school training;" by contrast, the Army, which recently awarded J & W a contract for similar services, may have enlistees who "may not even be at the 8th grade level functionally."

In summary of its position, the Navy states:

> "[We have] never argued that individual schools which have national (i.e., specialized) accreditation such as from the Council on Postsecondary Accreditation (COPA) are necessarily less capable of

> providing the services as stated in the RFP than other schools. However, a diverse number of institutions have been accredited by the COPA, including 'matchbook cover' schools which schools would not provide the Navy with the assurance that enlistees were being provided a proper education."

J & W first argues that the Navy may not, as a general principle, specify requirements for courses other than those set forth in the above Directive and Navy Instruction since the college reads the minimum criteria set forth in those documents as the only criteria which may be set forth in solicitations for these educational requirements. A literal reading of the documents, however, does not necessarily support J & W's argument since both documents preface the formal listing of the minimum criteria with the phrase "include the following." Since this phrase is used, it seems that the documents admit the possibility that other minimum criteria--for example, regional accreditation--may be specified if appropriate. Nevertheless, as noted below, we are recommending that the Secretary of Defense review the present wording of the Directive, especially in view of several protests which we have received concerning accreditation.

J & W further argues that, even if the regional accreditation requirement is not necessarily inconsistent with the Directive and Instruction, the Navy should have accepted its national accreditation and other evidence of ability to perform the required services as an acceptable equivalent to that specified by the regional accreditation requirement.

We have held that an offeror is entitled to have the opportunity to demonstrate a level of achievement equivalent to that specified in a definitive responsibility criterion exemplified by the regional accreditation requirement here; however, there need not be literal compliance with the specific letter of the criterion. See J. Baranello & Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322.

On the key point of credit transfer advanced by the Navy, J & W simply notes that the courses here are to be given on a noncredit basis--that is, only a "certificate of completion/attendance" is to be given. Consequently, J & W argues, there cannot even exist the possibility of the transfer of a credit which is not given in the first place. As to peer review the college argues that national accreditation also involves peer group review by the AICS and the State Board of Regents of Rhode Island where J & W is chartered. As to J & W's credentials in general, the college states:

> "Johnson & Wales College is not some marginally accredited, recently organized institution formed to capture a few government contracts and then collapse. Johnson & Wales College was founded in 1914. The College offers both two-year courses leading to Associates' degrees, and four-year Bachelor of Science programs. Johnson & Wales is chartered by the State of Rhode Island as a non-profit degree-granting institution of higher learning. In addition to its national accreditation by the Association of Independent Colleges and Schools, Johnson & Wales is approved for training by the U. S. Department of Immigration, the U.S. Veteran's Administration and is listed in the Higher Education Directories of the U. S. Department of Health and Human Services and the Department of Education.
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> "In addition to the foregoing, Johnson & Wales has sucessfully completed a functional skills education program (identical to the program involved here) at Fort Devens, Massachusetts, and is the current contractor now performing an identical program at Ft. Rucker, Alabama."

Finally, as to the suitability of a business college to educate students in general high school studies, J & W simply notes that it is a "four-year, degree-granting

[collegiate] institution" and the awardee is a "prep school."

Before examining the propriety of the Navy's decision to exclude J & W, a review of two recent decisions involving accreditation is appropriate. In School for Educational Enrichment, B-199003, October 16, 1980, 80-2 CPD 286, we denied the protest of a "non-accredited institution" against regional accrediting requirements incorporated in solicitations issued by the "Naval Supply Center, Charleston, South Carolina" and "Fort Carson, Colorado." Both solicitations apparently were for educational courses similar to those being procured here; however, there is no indication whether the courses were to be given on a credit or a noncredit basis. We upheld the requirement under a rationale which accepted similar reasons advanced by the Navy in this case, namely peer review and credit transfer. We noted the agencies' positions that, "while certification of individual instructors helps to assure individual competence, the agencies feel that the educational institution providing the instructors must be accredited as well."

In Pikes Peak Community College, B-199102, October 17, 1980, 80-2 CPD 293, we upheld the decision of Fort Rucker, Alabama, to award a contract to J & W for educational courses similar to those required here under a solicitation provision which also required regional accreditation. As we stated in the decision:

> "Pikes Peak has not alleged that accreditation by the AICS rather than the New England Association of Schools and Colleges adversely affects J&W's capacity to perform the required services. Rather, Pikes Peak simply asserts that accreditation by a national association does not comply with the specific letter of the requirement that the contractor be accredited by an appropriate state or regional association. The Army finds, however, that accreditation by the AICS is equivalent to accreditation by the New England Association of Schools and Colleges for purposes of demonstrating

> J&W's ability and capacity to perform. Pikes Peak has provided no evidence to the contrary. Moreover, we note that AICS is recognized by the Department of Education as an accrediting organization for 'postsecondary degree and non-degree granting institutions that are predominantly organized to train students for business careers,' and that the institutions it accredits are eligible for a variety of Federal programs. 44 Fed. Reg. 4017, 4018 (1979). Since the contractor is to provide instruction in basic reading, spelling, arithmetic, writing, and speaking and listening skills (to 9th grade competency levels), we believe the Army reasonably could view the AICS accreditation as the equivalent of other accreditation with respect to the services required here, and thus we find no basis to disagree with the agency's responsibility determination."

In commenting on the Pikes Peak Community College decision the Navy states that the decision does not hold "national accreditation [to be] the equivalent of regional accreditation [;] it only says that it might be." Further, the Navy notes that our decision stated that the solicitation should have clearly stated that accreditation equal to that specified would be considered.

We can appreciate the Navy's concern that schools which, as a practical matter, exist only on a "matchbook cover" would not be in a position to offer qualified instructional services. Indeed, our decision in School for Educational Enrichment furthers the notion that a definitive responsibility criterion involving accreditation may be properly specified. At the same time, by the Navy's own admission there are individual schools possessing only J & W's accreditation, which "are [not] necessarily less capable of providing the [required] services * * * than other schools."

Therefore, it is critical, we think, to examine the individual courses and institutions involved, and to be wary of a review procedure which may unintentionally eliminate qualified institutions. Here, since the courses in question are given on a noncredit basis, we do not understand how any degree-granting institution would afford transfer credit since the certificate of attendance might only convey mere attendance without any increase in skill level over that prevailing when the student began the course. Therefore, the fact that regionally accredited schools are more numerous and afford wider credit transfer opportunities is not a sound reason for excluding J & W. Further, in its report to our Office the Navy has enclosed a memo which generally describes accreditation procedures and accrediting organizations. The description of the accrediting procedure apparently common to both regional and national accrediting is said to involve "periodic reviews to ascertain whether accredited institutions continue to meet the criteria." Thus, this description tends to confirm J & W's assertion that it is also subject to periodic peer review. Therefore, we do not consider that the alleged absence of peer review is a factor which may properly exclude J & W. Neither do we consider that J & W's status as a business school, rather than a general studies educational institution, should necessarily exclude the college since effective teaching of business subjects at the collegiate level must necessarily involve language and math skills at a level higher than that associated with the high school--remedial level involved in the Navy's courses.

Finally, Fort Rucker (and, allegedly, Fort Devens) considered J & W's background and national accreditation to be such as to be equivalent to a regionally certified institution. Moreover, it seems to us that J & W's capacity to respond to the Army's teaching challenge suggests a flexibility--given J & W's collegiate status--to adjust to the change in student level capacities found in the Navy enlistees. Also, we are informed that the United States Marine Corps in a recent procurement for "Basic Skills" at Camp Lejeune, North Carolina, concluded that, although accreditation was a proper requirement for the contractor, the term accreditation should be defined to mean both accreditation by a regionally accredited association or by the

AICS which has accredited J & W. Therefore, we believe that the Navy should have considered the AICS accreditation and other evidence submitted by J & W as the equivalent of regional accreditation with respect to the services required here. See Pikes Peak Community College, above. Thus, we question the exclusion of J & W from the subject contract in the absence of a showing that J & W's proposed teachers for the courses are not capable of adequate instruction or that J & W otherwise lacks the necessary capability to perform the services.

Therefore, we are recommending that the Secretary of the Navy determine whether termination of the subject contract is feasible given the extent of performance, if any, under the subject contract. If the extent of performance is such that termination is still feasible, we are further recommending that the Navy--to the extent deemed necessary--then otherwise ascertain J & W's capability of providing the courses especially focusing on J & W's proposed teachers for the courses. Assuming J & W is considered otherwise capable of performing the services, we further recommend that the subject contract be terminated and a new contract be awarded to J & W assuming that the college agrees to accept award on the basis of its original offer.

In any event, we are recommending that the option provision in the awarded contract not be exercised; that any future solicitations for these noncredit courses state that, apart from regional accreditation, a school may be eligible for award if it otherwise demonstrates its institutional capability of providing the courses; and that prospective competitors for these courses be informed that investigations may be made of the credentials of proposed course instructors to determine the competitors' capability of satisfactorily providing these courses.

We are also informing the Secretary of Defense that in view of the protests our Office has received concerning accreditation requirements for these courses the present DOD directive may need to be changed to provide further guidance to the services on the acceptability of nationally accredited schools to provide these courses.

Protest sustained.

Milton J. Socolar

Acting Comptroller General
of the United States

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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-199970 DATE: June 8, 1981

MATTER OF: Association of Soil and Foundation Engineers

DIGEST:

Procurement procedures set forth in Brooks Bill, 40 U.S.C. § 541 et seq. (1976) are inapplicable where: (1) agency determines that soil testing analysis and report can be performed by other than professional architect-engineering (A-E) firm; (2) protester has failed to show that applicable State law specifically requires use of A-E firm for such services; and (3) contract is not incidental to A-E project.

The Association of Soil and Foundation Engineers (ASFE) protests the procedures used under request for quotation (RFQ) No. FQ467201930004 issued by the Department of the Air Force (Air Force) to obtain a soil testing analysis and report preliminary to rebuilding a taxiway at Castle Air Force Base, California. ASFE contends that the RFQ improperly utilized small purchase procedures because the procurement should have been conducted in accordance with the procedures required by the Brooks Bill, 40 U.S.C. § 541 et seq. (1976).

The protester argues that the Brooks Bill procedures are mandated because the services being solicited, particularly the report, must, allegedly, be performed by an engineering firm licensed in California in order to meet the requirements set forth in the RFQ. The Air Force asserts that the services in question do not require performance by an engineer or engineering firm and, therefore, since the estimated value of the award is under $10,000, it is appropriate to use small purchase procedures instead of Brooks Bill procurement procedures. We do not find any merit to this protest.

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The RFQ at issue is a resolicitation for services which had initially been solicited under small purchase procedures by an RFQ containing the following requirement:

> "CERTIFICATION: The soils investigation and report shall be under the direct supervision of a registered professional engineer proficient in soils and foundation engineering. The report shall be certified by the registered professional engineer."

In response to a complaint by ASFE that the solicitation should have been issued under Brooks Bill procedures, the Air Force canceled the RFQ.

The Air Force then reviewed the RFQ and determined that it had overstated agency needs. Accordingly, it revised the specifications to:

> "(a) delete the requirement for supervision by a registered professional engineer because such a service was not needed; (b) specify the exact location and number of test pits to be dug and borings to be taken; (c) specify the specific soil tests to be performed; and (d) require only the submission of a narrative soil investigation report rather than a narrative report of soils investigation with conclusions and recommendations."

The Air Force Contracting Officer who reviewed the revised specifications then determined that acquisition using small purchase procedures, rather than Brooks Bill procedures, was appropriate. The RFQ was subsequently issued to four soil test firms two of which submitted quotations. ASFE then filed a protest with our Office; award is being held in abeyance pending our decision.

It is the Air Force's view that the above RFQ revisions effectively converted the procurement from one in which the required services would necessarily involve the services of an engineering firm, to one in which the required services would not necessarily involve the services of an engineering firm. As further explained by the Air Force:

"There is no violation of [the Brooks Bill] by procurement of specific soil tests testing laboratory.

"The testing laboratory will provide a test report on the results of * * * soil tests but will not necessarily include technical comments or contractor recommendations.

"We do not believe a soil investigation by an [engineering] firm is necessary since [an Air Force] civil engineer should be able to design the project using the soil test reports.

"[The] main concern is the replacement of unstable soil supporting taxiway pavement. Results of [the] soil tests should determine the area and depth to be removed."

In reply, the ASFE contends that the revised RFQ still requires the exercise of the kind of judgment which, in the ASFE's view, may only be furnished under California law by a licensed engineering firm. For example, the ASFE notes that paragraph 7, Technical Specifications, of the revised RFQ requires the test report to "define the location and quantitative extent of all soil conditions" that do not meet certain specified characteristics. The ASFE argues that this requirement asks the contractor who prepares the report to "determine if the thickness of the [taxiway] pavement is compatible with the subsurface materials gathered through testing." And the ASFE argues that, although a "testing laboratory" may make "tests and offe[r] results of those tests," only an engineer licensed under California law may make the "judgment as to whether or not the subsurface [soils] are or are not compatible with the asphalt in place." Thus, according to the ASFE, any testing laboratory which may be interested in the work in question "must be under the control of a registered civil engineer" under California law.

Further, the ASFE argues that the contractor under the RFQ is to exercise judgment in regard to the procedures involved in taking soil samples, i.e., in determining the size of the "surface openings" of the "test pits." Finally, the ASFE argues that "all or most of all the firms to which the RFQ was sent are engineering firms."

The threshold question for decision is whether Brooks Bill procedures are generally applicable to Department of Defense contracting for architect-engineering (A-E) services. In Association of Soil and Foundation Engineers, B-199548, September 15, 1980, 80-2 CPD 196, we held that Defense contracts for A-E services are covered by Brooks Bill procedures only to the extent that the contracts are for "construction." ASFE has requested that we reconsider our decision. Nevertheless, it is clear that the present procurement is so intimately linked to the taxiway project (which is apparently to be completed regardless of the results of the report) that the procurement must be viewed as one for "construction." Thus, to the extent a Defense procurement must involve "construction" before these procedures apply, the subject procurement so qualifies.

In deciding whether Brooks Bill procedures apply here, we next determine the extent that a licensed engineer may necessarily be involved in performing these services. This approach is consistent with Umpqua Surveying Company, B-199348, December 15, 1980, 80-2 CPD 429, where we said:

> "In Ninneman Engineering--Reconsideration, B-184770, March 9, 1977, 77-1 CPD 171, we found that both the language of the Brooks Bill and the legislative history indicate that the Bill's procedures apply whenever (1) the controlling jurisdiction requires an A-E firm to meet a particular degree of professional capabilitiy in order to perform the desired services, or (2) the services logically or justifiably may be performed by an otherwise professional A-E firm and are 'incidental' to professional A-E services, which clearly must be procured by the Brooks Bill method."

Recently, we affirmed our denial of a similar protest by the ASFE against a procurement by the Fish and Wildlife Service (FWS) for "testing of soil samples obtained, and [for reporting] on the results of the samples obtained and testing performed." Association of Soil and Foundation Engineers--Reconsideration, B-200999, May 11, 1981. The approach taken in that case is for application in resolving the protest here. As we said in that decision:

> "The procuring agency has primary responsibility for determining its minimum needs. * * *. The record provided no basis

> for our Office to dispute [the agency's] position that the work could be performed competently by other than an engineer. Moreover, our review of [pertinent] State [law] revealed no statute which specifically required that soil borings and reports on soil borings be performed only by a registered professional engineer and no such statute was cited by the ASFE. Therefore, we could not substitute our judgment for the agency's that the work, including the report, could be performed by someone who is not an engineer and concluded that the Brooks Bill procedures were not applicable * * *.
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> "We did not then hold and we are not now holding that all contracts for soil boring and related reporting services must be procured by competitive bidding and that the solicitations cannot be restricted to engineers. Each procurement must be judged separately taking into account the individual circumstances of the work to be done and the needs of the agency involved. This determination is primarily the responsibility of the procuring activity and not our Office. Accordingly, if the ASFE or any other protester wishes to have us overrule an agency's decision to require/not require an engineer for a particular service, that protester must carry its burden of proof and show the agency's determination to be unreasonable. * * *. The ASFE did not carry its burden in this case."

Moreover, in our May 11 decision we concluded that the soil services involved were not required to be performed by an A-E firm under the circumstances even if a "judgmental report" was required--to the extent the "agency admitted that someone other than an engineer could competently report on the soil samplings."

Here, as in our May 11 decision, we are not in a position to question the procuring agency's judgment that the required services may be competently performed

by someone other than a licensed engineer. Specifically, we cannot question the Air Force's view that the information to be provided in the report in response to paragraph 7, above, of the RFQ may be properly stated in the form of a test result which does not necessarily involve the judgment of an engineer licensed under California law. Moreover, we are not aware of any pertinent California law which specifically requires that the report of the service to be furnished here must be prepared only by a licensed engineer; nor are we aware of any California State court or administrative ruling specifically bearing on the services in question. Finally, we cannot question the Air Force's apparent position that even though the contractor for the services may exercise some limited discretion in the taking of the soil samples this fact does not mean the services must necessarily be performed only by a licensed engineer.

In view of these considerations, it is our view that the protester has failed to show that the services here fall within the first category of the above Ninneman decision. Consequently, it is irrelevant that the RFQ was sent to several A-E firms.

Further, since engineering work for the design of the actual runway will be performed by the Air Force's engineer, and because the soil testing services are not incidental to any other A-E project, the contract in issue does not fall within the decision's second category.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States