The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chicago City-Wide College

File: B-228593

Date: February 29, 1988

DIGEST

1. Interim rules which implement statutory provision that allows for the elimination of unnecessary duplication of off-duty post-secondary education program course offerings are consistent with statute, even though regulations provide for a theater-wide rather than an installation-by-installation determination of what constitutes "unnecessary duplication" and establish economic and logistical criteria for making determination. The statute does not prescribe the methodology for making "unnecessary duplication" determinations and provides that duplicative course offerings need only be permitted "to the maximum extent feasible." As such, the statute does not prohibit determinations based upon economic and logistical considerations.

2. Solicitation which restricts the award of contracts for discrete course categories to a single educational provider for each category is legally unobjectionable where issued pursuant to a regulation consistent with statutory allowance for the elimination of "unnecessary duplication."

DECISION

Chicago City-Wide College (CCC) protests the terms of request for proposals (RFP) No. F64605-87-R-0024, issued by the Department of the Air Force, Pacific Air Forces (HQ PACAF), for the procurement of post-secondary undergraduate educational services for the United States Pacific Command (USPACOM).1/ CCC alleges that the terms of

1/ HQ PACAF has issued this solicitation in its capacity as the executive agent for educational services, United States Pacific Command. HQ PACAF is charged with the administration of educational services programs for all services (i.e. Army, Navy and Air Force) in the Pacific Theater.

the solicitation violate § 1212 of the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99 Stat. 583, 726 (1985), codified at 10 U.S.C. § 133 note (Supp. III 1985).

We deny the protest.

The solicitation was issued on June 1, 1987, and calls for offers to conduct post-secondary undergraduate courses in six discrete categories for the entire Pacific Theater. The RFP further provided, in Sections F-4 and H-9, for the execution, after award, of an "articulation agreement" between the institutions awarded contracts under each of the above-mentioned course categories. In essence, the solicitation contemplates the award of a separate contract for each of the six course categories and an institution may be awarded more than one course category. Each of the "awardee institutions" is then to enter into the "articulation agreement" whereby the institutions agree to refrain from offering courses in any of the remaining course categories, and agrees to bear responsibility for the conduct of courses in the course category or categories for which the institution has been awarded a contract. In short, the solicitation seeks to provide a single contractor for each of the six course categories for all installations in the Pacific Theater.

Section 1212(b) of the Pub. L. No. 99-145 provides as follows:

> "No solicitation, contract, or agreement for the provision of off-duty post-secondary education services for members of the Armed Forces of the United States, civilian employees of the Department of Defense, or the dependents of such members or employees, other than those for services at the graduate or postgraduate level, may limit the offering of such services or any group, category, or level of courses to a single academic institution. However, nothing in this section shall prohibit such actions taken in accordance with regulations of the Secretary of Defense which are uniform for all armed services as may be necessary to avoid unnecessary duplication of offerings, consistent with the purpose of this provision of ensuring the availability of alternative offerors of such services to the maximum extent feasible."

According to CCC, the terms of the solicitation clearly violate this statutory provision and no valid regulations

have been promulgated by the Secretary of Defense (as required by the terms of the statute) to except this procurement from the statute's prohibition against limiting a group of courses to only one academic institution.

The agency report indicates that the Office of the Secretary of Defense (OSD) issued interim rules which were published in the Federal Register on October 30, 1987, and made effective on that date.2/ The agency is permitting comments on these interim rules prior to further action under this RFP. Therefore, the issue is whether these interim rules and the RFP are consonant with the intent of § 1212.

The protester argues that under the statute, while there is no absolute prohibition against limiting a group of courses to a single academic institution, such limitation must occur on an installation-by-installation basis and only the elimination of "unnecessary duplication" in course offerings is permissible. Thus the protester urges us to conclude that the interim rules violate the intent of § 1212(b) because they define "unnecessary duplication" as any duplication which is detrimental to the educational services program in the theater and fails to take the installation-by-installation approach mandated by Congress. The protester also argues that the criteria listed in the rules, and to be applied in determining whether a group or category of courses should be limited to a single institution, relate to the convenience of the services and the economic advantage of the offering institutions rather than to the quality of services delivered to service members.

The agency argues that the existing rules comply with § 1212(b) because they allow for course duplication "to the maximum extent feasible" and in any event that the statute does not mandate an installation-by-installation determination. The agency further argues that circumstances in the Pacific Theater necessarily mandate a procurement which is conducted on a theater-wide basis rather than on an installation-by-installation basis and that considering economic factors as well as convenience of the services is

---

2/ These interim rules amend title 32, Code of Federal Regulations and include the terms of an Office of the Secretary of Defense memorandum of October 1. See 52 Fed. Reg. 41,707 (1987) (to be codified at 32 C.F.R. Pt. 72). The notice invited public comment for a period of 30 days. While the 30-day period has expired, no final rule has yet been published.

consistent with the statute. In particular, the agency points out that the Pacific Theater is comprised of many small installations (along with a few large installations) which are highly dispersed geographically and that many of the installations could not independently provide a sufficient student population to sustain a post-secondary educational program. Accordingly, the agency argues that procuring educational services on a theater-wide basis, and taking into account the economic considerations which will enable offerors to provide services at small geographically remote installations, is the only viable method of insuring that the greatest number of prospective students can be serviced.

We think that OSD's interim rules are consistent with the statute. Specifically, we conclude that the statute does not demand that regulations which implement its terms provide for an installation-by-installation assessment of whether "unnecessary duplication" exists, nor do we think it legally objectionable that the criteria for determining whether "unnecessary duplication" exists contain factors which relate to the economic or logistical viability of having multiple providers. Stated differently, we have no objection to these implementing rules which call for a theater-wide assessment of the viability of employing multiple providers, even where that assessment contemplates consideration of economic and logistical concerns.

First, the statute is silent with respect to the methodology that the Secretary of Defense must employ in assessing whether there exists "unnecessary duplication." Section 1212(b) merely provides that regulations which may be promulgated be uniform for all services and provide for the ability of services to take action to avoid the unnecessary duplication of offerings consistent with the first clause of statute to the maximum extent feasible. This conclusion is reinforced by a consideration of previous versions of the statute which were not ultimately adopted. For example, the version of § 1212 which was reported out of the House Committee on Armed Services contained the following language:

> "The Secretary concerned may take such action as may be necessary to avoid unnecessary duplication in the offerings of courses at a military installation consistent to the maximum extent feasible with ensuring alternative providers of education."

H.R. 1872, 99th Cong. 1st Sess. § 801 (1985). Similarly, the original version of § 1212 passed by the Senate contained the following language:

> ". . . nothing in this section shall restrict the ability of duly constituted personnel at the military installation level to take such actions as may be necessary to avoid unnecessary duplication of offerings, consistent with the purpose of this provision of ensuring the availability of alternative offerors of such services to the maximum extent feasible."

S. 1160, 99th Cong. 1st Sess. § 905 (1985). While the conference committee report (S. Rep. No. 118, 99th Cong. 1st Sess. 475 (1985) contains language suggesting that responsibility for unnecessary duplication should be exercised at the installation level, the fact remains that the language requiring determinations at the installation level was ultimately omitted from the finally enacted version of § 1212. Therefore, we think a plain reading of the statute does not prohibit determinations concerning "unnecessary duplication" on other than an installation-by-installation basis.

We also consider the argument of CCC, to the effect that the statute prohibits consideration of economic and logistical viability in determining whether "unnecessary duplication" exists, to be without merit. The statute by its own terms requires only that multiple providers be accommodated "to the maximum extent feasible." In our opinion, the concept of feasibility contemplates precisely those economic and logistical considerations outlined in the OSD interim rules. We therefore conclude that the interim rules are consistent with the terms of the statute, and may serve as a valid basis under which to except a procurement action from that portion of the statute requiring the accommodation of multiple providers.

As to the validity of the solicitation, we conclude that it has been issued in accordance with the requirements of the statute as implemented by the interim rules. In particular, we point to a determination and finding (D&F), executed by the Air Force on October 16, 1987, which makes the findings required under the interim rules with respect to the elimination of "unnecessary duplication" within the Pacific Theater. While we understand that this D&F was executed after the solicitation was issued to conform the solicitation to the requirements of the interim rules, we

nonetheless conclude that it may serve as authority for this solicitation, which is in its early stages.

The protest is denied.

James F. Hinchman
General Counsel