The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chicago City-Wide College--Reconsideration

File: B-228593.2

Date: July 19, 1988

DIGEST

Decision is affirmed that a solicitation for educational services issued on a Pacific theater-wide basis does not contravene a statutory provision which calls for multiple offerors, but also provides that the Department of Defense (DOD) may conduct procurements for such services in a manner to avoid unnecessary duplication of offerings consistent with ensuring alternate offerors to the maximum extent feasible. Thus DOD properly could limit the number of service providers on a theater-wide basis on unnecessary duplication grounds.

DECISION

Chicago City-Wide College (CCC) requests reconsideration of our decision in Chicago City-Wide College, B-228593, Feb. 29, 1988, 88-1 CPD ¶ 208. In that decision, we denied CCC's protest of the terms of request for proposals (RFP) No. F64605-87-R-0024, issued by the Department of the Air Force, Pacific Air Forces, for the acquisition of off-duty post-secondary undergraduate educational services for the United States Pacific Command. In its request for reconsideration, CCC argues that our original decision is incorrect as a matter of law.

We affirm our prior decision.

In its original protest, CCC argued that the terms of the RFP violated section 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. § 113, note (Supp. IV 1986). The statute provides that:

> "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."

CCC argued that the terms of the statute, when read in conjunction with its legislative history, required that determinations as to the possible elimination of "unnecessary duplication" be made on an installation-by-installation basis rather than on a theater-wide basis as provided for in the Office of the Secretary of Defense's Interim Regulations, 52 Fed. Reg. 41,707 (1987) (to be codified at 32 C.F.R. pt. 72), and as reflected in the RFP (which called for "single providers" in each discrete course category for the entire Pacific Theater).

The Air Force responded that it would be unable to carry out its duty to provide post-secondary education for all installations in the Pacific theater unless it could find a provider willing to serve the smallest as well as the largest installations. Accordingly, the Air Force argued that it was required to restrict the number of offerors at large installations in order to provide an economic incentive for institutions to offer courses at remote "unprofitable" locations. Thus, the Air Force urged us to conclude that "unnecessary duplication" determinations could properly be made on theater-wide basis, taking into account the demographics of the Pacific theater.

In our original decision, we disagreed with CCC, concluding that the terms of the statute did not preclude determinations of "unnecessary duplication" upon a theater-wide basis and, thus, that both the interim regulations and the solicitation were legally unobjectionable. We based our conclusion upon the fact that earlier versions of the statute prior to its enactment contained language requiring that the "unnecessary duplication" determinations be made

"at the military installation level," but the final version contained no such limitation. See H.R. 1872, 99th Cong. 1st Sess. § 801 (1985); S. 1160, 99th Cong. 1st Sess. § 905 (1985). We also concluded that, while the conference committee report on the finally enacted section 1212 (S. Rep. No. 118, 99th Cong. 1st Sess. 475 (1985)) contained language suggesting that responsibility for unnecessary duplication should be exercised at the installation level, the language was not dispositive in light of the amendments made to the statutory language during its final consideration in conference.

In its request for reconsideration, CCC again asserts the position that the statute, when read together with the language contained in the conference committee report, requires an installation-by-installation assessment of whether "unnecessary duplication" exists. CCC specifically points to the following language appearing in the conference committee report:

> "With respect to avoidance of unnecessary duplication, the conferees intend that the Secretary of Defense will promulgate guidelines and standards for the regulation of course offerings to avoid unnecessary duplication, which will be uniform for all the armed services and which will take into account the demographics of individual installations.
>
> "Responsibility for controlling unnecessary duplication of courses should be exercised at the installation level consistent with the purpose of this provision of ensuring service members, to the maximum extent feasible, choice among the providers of these educational services. The conferees do not expect this authority to be used to deny an educational institution the authority to offer an individual course which is an integral component of a specified curriculum."

S. Rep. No. 118, 99th Cong. 1st Sess. 475 (1985).

The protester argues that the conference report clearly shows the intent of Congress that the responsibility for duplication be exercised at the installation level and thus that the Air Force's exercise of this responsibility on a theater-wide basis contravenes the law's intent.

As noted in our prior decision, although we recognize that the conference report language lends support to the protester's position, we believe the most significant (and dispositive) aspect of the legislative history lies in the language changes which occurred to section 1212(b) during

its consideration by the conference committee. The paramount nature of this concept has been unequivocally embraced by the courts. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." I.N.S. v. Cardoza Fonseca, 107 S. Ct. 1207, 1219 (1987) (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-393 (1980) (Stewart J., dissenting)). See also Russello v. United States, 464 U.S. 16, 24-25 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

We do not think the conference committee would abandon the earlier, clear versions of the bill in favor of a provision which, if it is to mean the same thing, requires reading into the statute another provision which had been discarded during the enactment process. Rather, we think the modification of the earlier versions of section 1212(b) was intended to have some purpose; to adopt the protester's view would require us simply to ignore the changes that were made as the bill was considered. In this regard, we note that the protester has not offered any explanation as to why the initial bill language was deleted or why that action is not significant for purposes of interpreting what ultimately was enacted. Accordingly, we believe, as a result of the changes made to section 1212(b), that Congress as a whole ultimately decided to allow the Secretary of Defense flexibility in implementing section 1212(b) when it eliminated the wording dealing with the level of authority that was to determine what would be "unnecessary duplication."

In the final analysis, the Air Force reports, and we have no reason to doubt, that it will be unable to carry out its duties to provide post-secondary education for all its installations in the Pacific unless it is able to find a qualified provider willing to serve the smallest as well as the largest installations. While it may be possible to obtain multiple providers for a large installation, providers would not be available for a small or remote installation standing by itself. The lack of providers to serve small installations has been a past problem and we are not prepared to say that Congress intended to constrain the Secretary's discretion to address this practical consideration. We cannot say that the position taken by the Air Force is either unreasonable or outside the language of the statute, which requires only that multiple providers be allowed to offer duplicative courses "to the maximum extent feasible."

We therefore adhere to our original position that the regulations issued by the Secretary of Defense and the RFP in question are legally unobjectionable, and we affirm the prior decision.

Milton J. Socolar

Acting Comptroller General
of the United States