

UBIQUITY

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December 2021

“Ubiquity.” What a thought-provoking word! (Well, it has always been for me, anyway.) I suppose we all have some few “favorite” words, whether or not we actually recognize them as such, so that when we do encounter them, even serendipitously (ah — there’s another!), endorphins start to flow, and mental images begin to appear. “Ubiquity” is one such suggestive word. It is, indeed, an interesting word, even though there aren’t many occasions that we might get to use it. How often do we encounter a situation where someone or something is truly “omnipresent; seen everywhere; especially simultaneously?” What might fit such a robust definition?

Unfortunately, these days, Covid-19 is in that category, but, also, on a happier note, so are McDonald’s and Dunkin Donuts! In fact, I well remember a time, in far-away Riyadh, when my wife, Heather, and I, to our very pleasant surprise, came upon a Baskin Robbins. As it turned out, we each were able to order one of the “31 Flavors” of their ice cream, but, alas, Heather had to call out her order from the threshold of the shop’s entranceway, as women were not permitted entry into the shop. Ubiquity, apparently, sometimes comes with local adaptations!

We University of Maryland vagabonds (another interesting word!) know the concept of “everywhere at once” very well. Long before our esteemed UMUC morphed from that rather nondescript nomenclature to the more descriptive “Global Campus,” we knew we had colleagues spread out from College Park, to Lakenheath, to Sembach, to Iraklion, to Incirlik, to Bangkok, to Vladivostok, to Misawa, to Subic Bay, to Guam, to Hawaii, and to many other places, large and small, in between. Like the British Empire of old, the “sun did not set on the UMUC campus.” That made our tenure with the University fascinating, of course, but, more substantively, it gave our *raison d’être* — our students — the opportunity to take courses along a measured path to a degree, no matter where they might find themselves posted among the then-ubiquitous US military bases scattered about the globe.

But, how to “stabilize” that academic journey for them, with some degree of predictability as to course availability? Would there be any way to know that the necessary sequencing of course work would be available to them, and how might that be done on a global-campus basis? This was a compelling issue with which University Administrators, such as Joe Arden, other Maryland staff in Heidelberg and Yokota, and Base Education Service Officers, as well our students, had to grapple.

Some years ago, I wrote an article (published in the *Air Force Law Review*, 29 A.F.L. Rev. 249), that describes some of the mechanics of how the courses we taught were actually delivered to our world-wide campus, first on a rather ad hoc basis, and then later on a contract basis. For those who might be interested in some of that history, I have copied that article, for your convenience, hereinbelow.

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The Acquisition of Postsecondary Educational Services

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I. INTRODUCTION

Although there are many reasons men and women may choose to voluntarily serve their nation as members of the armed services, many, no doubt, choose to do so in part because of the educational opportunities available to them as a result of such service. Indeed, especially in an all-volunteer force environment, the services' personnel recruiters routinely rely upon the educational opportunities available to servicemen and women, both on duty and off, as a major "selling point." Moreover, believing that military members should share the same educational opportunities that are available to other U.S. citizens, it is Department Defense (DOD) policy¹ that each of the services establish educational programs that provide opportunities for its personnel to achieve educational, vocational, and career goals.²

In this context, the acquisition of off-duty educational opportunities for men and women in the Armed Forces is a matter of significant concern to the military service departments. In a very real sense, how well or how badly the services address this issue dramatically impacts on what is rightly perceived as an important quality of life factor for servicemen and women. One would expect that this, in turn, would have a long-range impact on the overall quality of our Armed Forces. The approach taken in this article is to identify some of the basic procedural rules facing the attorney advising contracting officers in this area, to highlight some matters of historical interest and of current concern, and to identify some potential pitfalls so they may be successfully avoided. For most attorneys, the acquisition of postsecondary educational services is an unfamiliar area. Although there has been some significant experience within the Department of Defense, particularly recently, it is not a subject that has been either widely or routinely addressed. For the most part, within the Air Force, the lion's share of this experience has occurred at overseas locations within the United States Air Forces, Europe (USAFE) and Pacific Air Forces (PACAF) theaters of operations. A brief overview of that experience may be in order.

II. HISTORICAL CONTEXT

American colleges and universities have offered educational programs at military installations for many years.³ In Europe, schools have been providing such services since 1949, and, in the Pacific, since the early 1950's. These postsecondary education services have been acquired from a wide variety of academic sources coming from all parts of the country. Some participants have been two-year community colleges⁴ offering curricula leading to associate degrees. Others have been four-year institutions⁵ offering baccalaureate or graduate degrees or both.

The relationship between the military services and these providers has, over the years, been a pragmatic one. That is, it has been viewed as a mutually beneficial association, but one requiring a considerable amount of flexibility and tolerance on the part of both parties just to make the complex and far-flung system work. It is not difficult to understand this attitude when one

considers that Europe alone contains a potential student population base of some 350,000 active-duty military members (with a like number of DOD civilian employees and military and civilian dependents), all spread over 170 major military installations.⁶ The logistics of delivering quality education services such that these military students will consistently have a reasonable opportunity to acquire both required and elective coursework in sufficient quantities and within an appropriate period of time to ensure progress towards a degree, is quite impressive.

Until relatively recently, the relationship between the military and academic institutions, has tended to be an "open" one. Institutions have rather freely entered and exited the market depending upon how well they perceived their interests as being served by being available to provide services or not. It is also significant to note that the military services do not pay appropriated funds directly to institutions to provide such services at their installations, but do so only indirectly in the form of tuition assistance⁷ to their military members. For these reasons, the past relationship between the military services and academic providers has been somewhat unstructured and, in many cases, even noncontractual in nature.⁸ In those arrangements that were, in fact, "contractual," the relationship was noncompetitive, rather loosely defined as to duration, and, in that format, more often than not, merely so as to afford the military services a vehicle whereby logistical support might be extended to the schools' employees who would otherwise be ineligible to receive such support in an overseas environment.⁹

By the mid-1970's, by most accounts¹⁰, this rather loosely defined system began to show danger signs that, if left unchecked, might undermine it to the point that the interests of students and the military services alike would no longer be well served. More and more academic institutions had begun to offer courses at military installations both overseas and in the United States. Very real concerns for the quality of such services were being voiced. Because of the relatively small number of military personnel at most of the more than 300 installations worldwide, there is always a limited number of students interested in any given course. With the coming of more colleges, duplication of courses and programs became common. Sound academic planning by institutions, military education services officers and students was necessarily more difficult. As a result, course cancellations were fairly commonplace, and pressure seemed to mount to lower academic standards in order to attract students.

In response to this, the DOD commissioned two in-depth studies.¹¹ These studies confirmed the concerns, finding, *inter alia* that programs of varying quality were being offered, and effective program planning was difficult because of course offering duplications. The studies concluded that new procurement procedures should be implemented for education programs overseas.¹²

As a result, the Air Force, acting as "executive agent" for all the military services in the Pacific, and independently through Headquarters USAFE in Europe, issued Requests for Proposals (RFP's) in 1983 for postsecondary education services that resulted in contracts being awarded. The key elements in both contract solicitations were the virtual elimination of program and course duplication by requiring each academic element be stated as a separate Contract Line Item (CLIN), with only one award being made for each CLIN, and for the first time, factors speaking to "quality" of educational services were to be considered in the source evaluation and selection process. The PACAF contract was for one basic year with four option years thereafter. The USAFE contract relied upon the multiyear procurement technique to establish a continuous five-

year program. Both awards successfully withstood GAO protests by unsuccessful offerors. The military services are, at the time of this writing, attempting to resolicit and award follow-on contracts in Europe and in the Pacific.

III. PRESENT LAW AND RULES

From the earlier procurements to the present efforts, there have been some major changes in the process that have significantly affected these resolicitations. One particular academic provider that had been very successfully involved in rendering such services had its course offerings significantly curtailed as a result of the new RFP process. The Congress, in direct response to constituent community colleges' concerns about their diminishing role in providing undergraduate educational services at military installations, intervened in the procurement process by adding an amendment to the 1986 Department of Defense Authorization Act,¹³ ostensibly to provide for more open competition between community colleges and four-year institutions.

The Authorization Act provides that solicitations and any resulting contracts entered into after April 1, 1985, for educational services for the military departments may not:

[d]iscriminate against or preclude any accredited academic institution authorized to award . . . associate degrees from offering courses ... solely on the basis of such institution's lack of authority to award a baccalaureate degree. ... [l]imit the offering of [postsecondary education services] ... to a single academic institution. However, nothing ... shall prohibit such actions 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 ...to the maximum extent feasible.¹⁴

The legislative history¹⁵ accompanying this law makes some additional illuminating points. It indicates that responsibility for controlling unnecessary duplication of courses should be exercised at the "installation level consistent with the purpose of this [act] of ensuring service members, to the maximum extent feasible, choice among the providers" of educational services. The conferees also indicated that educational institutions should not be denied the authority to offer an individual course that is an "integral component of a specified curriculum" on the basis of this unnecessary duplication authority, nor should more than one provider be required where "only a single qualified provider desires to offer" such a program. Additionally, the new law required the Government Accounting Office (GAO) to review, and to report on, the voluntary education services programs of the military services. The GAO was tasked to examine how best to meet the educational needs of military personnel, DOD civilian employees and their dependents, and the cost of providing such services. That report has now been submitted. After an extensive review of the system in Europe, the GAO concluded:

Education services in Europe can be delivered feasibly under either a single or multiple provider system. [Because of limited data] no conclusion as to which system is more effective [was made]. ... a decision to use a single or multiple provider system revolves largely around the questions of whether competition is needed in the selection of schools and whether there are nonmeasurable advantages or disadvantages to having more than one institution offer the same or similar ... courses.¹⁶

Thus, believing that these questions should be resolved "by the policy makers" after additional experience is gained under the single provider system, the GAO made no recommendations.¹⁷

To implement the new law, the DOD issued an Interim Rule.¹⁸ It reflects the requirements of the new statute, prescribes criteria for avoiding unnecessary duplication of educational services, and assigns responsibility for implementation of the Rule to the overseas military theater commanders. It defines "unnecessary duplication" as "any duplication which is detrimental to the educational services program within the theater," and goes on to list the following as criteria that must be satisfied before the number of providers may be limited:

The demographic distribution of the potential student population precludes the effective delivery of postsecondary educational services by multiple offerors. Adequate classroom space ... is not available to multiple providers. Adequate administrative space ... is not available to multiple providers. DOD educational staff at installation level ... is not available. The Theater Commander cannot reasonably provide logistic support to installations and ... employees ... if there are multiple providers. Status of Forces Agreements (SOFA's) preclude multiple providers.¹⁹

In both the Pacific and in Europe, contracting and education offices have presently begun the process of acquiring educational services for the next ensuing academic years. PACAF, acting again as executive agent for all the services in the Pacific, issued six RFPs in June 1987. In compliance with the new statute, both two-year and four-year institutions may submit proposals for five of the six RFP's. If a two-year or a four-year institution chooses to form a consortium with its opposite number, the consortium could submit proposals on all six RFP's. Also, in a first use of the new Interim Rule's criteria, the Theater Commander has, in fact, formally determined to limit the acquisition of course offerings at each installation to one institution for each separately identified group of courses.²⁰ However, the process has been stayed pending DOD's receipt and analysis of public comments to the Interim Rule. In Europe, USAFE and United States Army Europe are considering the merits of a joint procurement action in 1989.

IV. CONCLUSION

Although the scope of this article does not extend to a step-by-step discussion of the acquisition process, a few comments regarding "technique" may, nevertheless, be helpful. First, as in any complex or unique contracting effort, proper acquisition planning is a must. The Federal Acquisition Regulation defines acquisition planning²¹ as "the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated" so as to ensure that "the Government meets its needs in the most effective, economical, and timely manner."²² A multidisciplinary team consisting of legal, fiscal, contracting and education specialists will be required for an acquisition of this sort if it is to be properly planned, thoroughly executed, and able to withstand challenge. There will of course be unknowns, and even perhaps "second guessers" in an environment as dynamic as this one. Consequently, the foundation for any meaningful and cost-effective educational program should be a reliable and complete "educational needs assessment."²³ Based on this, the acquisition plan will be a true statement of the Government's requirements. Because these "assessments" have been found to vary among the services in scope, focus and methodology,²⁴ the practicing attorney should be at least generally aware of the elements of such an assessment, and be prepared positively to influence their development early in the process.²⁵

Second, it is absolutely critical to the overall success of the acquisition to develop and then scrupulously adhere to a well-thought out "source selection plan."²⁶ This should consist of at least two parts: An unambiguous description of the organization, membership, and

responsibilities of the source selection team; and, most importantly, the identification of evaluation criteria and detailed procedures for proposal evaluation.²⁷ Careful consideration given to this process will pay later dividends many times, over. Some factors that should be included here without fail, in the author's opinion, are provision for academic quality controls in the contractors' proposal, such as academic instructors' backgrounds, the availability of research facilities, and the like, and past performance by the proposed contractor.²⁸ The better the source selection plan, the more likely it is that the Government will be able to analyze contractors' proposals with certainty and in accordance with the proposals' true merit, to ensure the best source will indeed be selected.

Endnotes

1. See DOD Dir. 1322.8, Voluntary Educational Programs for Military Personnel, (Feb. 1980, rev. July 1987).
2. To satisfy this requirement, the military services have established these programs: The Air Force Education Services Program, AFR 213-1; The Army Continuing Education System, AR 621-5; and, The Navy Campus, CNET Instruction 1560.3B.
3. U.S. General Accounting Office (GAO) Report to Congressional Committees, DOD Voluntary Education-Determining and Meeting Postsecondary Education Needs in Europe, GAO/HRD-88-12 (Dec. 1987) at 10.
4. E.g., City Colleges of Chicago, Central Texas College, Los Angeles Community College, Big Bend Community College.
5. E.g., The University of Maryland, The University of Oklahoma, Boston University, The University of Southern California, University of LaVerne, Southern Illinois University, Embry-Riddle Aeronautical University.
6. GAO Report, *supra* note 3, at 10.
7. The services provide tuition assistance for up to 75% of the servicemembers' costs. In 1985, the military provided over \$16 million for members in Europe. GAO Report, *supra* note 3, at 10.
8. This has, at various times, taken the form of memoranda of understanding (MOU), basic ordering* agreements (BOA), and other forms of agreement. See Pub. L. No. 99-145, Legislative History, 1985 U.S. CODE CONG. & ADMIN. NEWS (vol 2) 630.
9. See, e.g., DFAC 84-13, item 12.
10. Personal interview with Dr. Joseph Arden, Director, University of Maryland, European Division, at Heidelberg, West Germany (14 March 1988).
11. The Council on Postsecondary Accreditation (COPA), 1979, and the Office of the Secretary of Defense (OSD), 1981.
12. GAO Report, *supra* note 3, at 11.
13. Dixon Amendment, Pub. L. No. 99-145, § 1212, 99 Stat. 583, 726 (1985), 10 U.S.C. § 113, note.
14. Pub. L. No. 99-145, § 1211, 99 Stat. 583, 726 (1985).
15. 1985 U.S. CODE CONG. & ADMIN. NEWS (vol. 2) 630.
16. GAO Report, *supra* note 3, at 35.
17. Not everyone was in total agreement with the GAO's report. The Director of USAFE's educational services felt that the report failed to draw the positive conclusion regarding the single provider system that the raw data collected by the GAO investigators seemed to suggest is appropriate. See *Education Services Director Unhappy With Report on USAFE*, The Stars and Stripes, 26 Jan. 1988, at 2.
18. Interim Rule, Acquisition of Educational Programs in Overseas Areas (1 Oct. 1987), 52 Fed. Reg. 41,707 (10 Oct. 1987).
19. Id.
20. HQ PACAF/CV letter (10 Oct. 1987). In making this determination, the Commander made these findings, among others: The demographic distribution of the student population within USPACOM [United States Pacific Command] precludes the effective delivery of postsecondary education services by multiple offerors. The scarcity of locally qualified instructors in USPACOM precludes the effective delivery of postsecondary education of services by multiple offerors. The enrollments generated at the large

installations with high class averages are used to balance the low class averages at the isolated/remote locations providing for economies of scale and to ensure the availability of the widest range and highest quality of educational services possible at a reasonable tuition rate. The GAO recently considered whether or not the theater commander had the authority to make this determination. *Protest of Chicago City-wide Colleges*, Comp. Gen. Dec., B- 228593, (29 Feb. 1988). In that case, the GAO concluded that it *was* permissible to limit course offerings at an installation to a single academic institution and, further, that the theater commander could, in fact, make this determination.

21. Federal Acquisition Regulation (FAR) 7.101.
22. FAR 7.102.
23. DOD Dir. 1322.8. *See* implementing agency regulations cited *supra* note 2.
24. GAO Report, *supra* note 3, at 16.
25. *See, e.g.*, JOINT COMM. ON STANDARDS FOR EDUCATIONAL EVALUATION, STANDARDS FOR EVALUATIONS OF EDUCATIONAL PROGRAMS, PROJECTS, AND MATERIALS, (1981).
26. *See* DOD Dir. 4105.62 (Sept. 1985) and Air Force Regulation 70-15 (Feb. 1984).
27. DOD Dir. 4105.62, at para. E.3.
28. For an excellent discussion of this subject, *see* R. NASH & J. CIBINIC FORMATION OF GOVERNMENT Contracts 540 (2d ed. 1986). 254 - *The-Air Force Law Review/1988*