

August 30, 2010

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Solicitation: VA118-10-RP-0052, R--Transformation Twenty-One Total Technology (T4)
FINAL SOLICITATION, July 26, 2010; Amended August 4 & 13, 2010

Agency: Department of Veterans Affairs
Office: VA Technology Acquisition Center
Location: VA Technology Acquisition Center

Reason for protest:

Solicitation VA118-10-RP-0052 contains an arbitrary and capricious procedure for selection of awardees. No precedence for such a procedure has been found to substantiate such a selection procedure. The VA does reference the FAR and VAAR within Section M1 of the solicitation but provides no guidance or justification for the unorthodox selection process.

The VA ignores 38 USC 8127 and 8128 (“VETS First”) except where they are aware that they will have the ability to conduct the awarding of Task Orders in any manner they choose. The “Veterans First Contracting Program” applies to the commercial sources (open-market) acquisitions of goods and services within the VA only.

Congress’ intent in creating P.L. 109-461 was to provide the mechanism whereby the agency responsible for veterans who, after their active duty, can earn an opportunity to do business with the federal government. P.L. 109-461 amended 38 USA 8127 and 8128. “VETS-First” is within 38 USC. 38 USC applies to only the VA. Where there are conflicts between 38 USC 8127 & 8128 and the FAR, GSA Schedules, or the SB Act (15 USC) within the VA, 38 USC 8127 & 8128 prevail.

Under 38 USC Section 8127 or 8128, there is a reference to the Small Business Act (15 USC) for defining “The term ‘small business concern owned and controlled by veterans’.” Another reference to the SB Act (15 USC) is that sections 8(a) and 31 priorities are after VOSB’s and SDVOSB’s but before “small business.” There is no other reference to the SB Act (15 USC).

ALL VA purchases, including the GSA or FSS Schedule purchases the VA is presently conducting, should fall under 38 USC 8127 & 8128.

We reference FAR Part 19.1405 -- Service-disabled Veteran-owned Small Business Set-aside Procedures and FAR Part 19.1406 -- Sole Source Awards to Service-disabled Veteran-owned Small Business Concerns. FAR Part 19.1405 and FAR Part 19.1406 are not applicable to VOSB & SDVOSB competitive procedures **within the VA**. Title 38 USC is the law for the VA. Within the VA, Title 38 USC 8127 & 8128 supersede FAR Part 19.1405 and FAR Part 19.1406. 38 CFR 74, where applicable, supersedes 13 CFR 120-125.

Additional comments:

There are many reasons why the “Reserve Process” that TAC is using in the T4 RFP is detrimental to all veterans and why congress did not allow the VA to follow a willy-nilly manner in procurements. The T4 RFP states there will be 4 SDVOSB and 3 VOSB awards. This will result in a total of 7 awardees; if there are that many within the competitive range after evaluation and ranking. The primary objection to this is the VA-TAC assumption that 8 of the top fifteen will be large/non-VET businesses. 7 out of 15 are not half. If they seriously want to show they are supporting “VETS-First” why isn’t the count 8 VETS and 7 non-Vets? VA has stated that the 4 & 3 numbers are based upon market research conducted by the Technology Acquisition Center. The Market Research was conducted under non-published procedures with results known only to the VA TAC. It can be derived from VA’s chosen selection criteria that they want to issue more Task Orders to large business than to VOSB’s & SDVOSB’s. This is not “VETS-First.”

T4 RFP (VA118-10-RP-0052-012[1]), 7.3.2 Task Execution Plan (TEP) states:

“In order to meet contracting goals, the Government reserves the right to set-aside at the task order level. Otherwise, fair opportunity requirements shall be in accordance with applicable statutes, regulations, and case law. The Government’s RTEP does NOT constitute an authorization to start work.”

What “applicable statutes, regulations, and case law?” Is the VA being straightforward and honest with the Veterans in saying they will exercise “VETS-First?” If so, why do they need the above statement? This is a further example that VA TAC is using arbitrary and capricious procedures for selection of awardees.

The established purpose of Public Law 109-461 was to provide a program at the VA that can be extended to additional agencies. T4 is completely contrary to the intent of Public Law 109-461. T4 invites large business to take what they want and leave the crumbs for the VETS. The full and open T4 RFP coupled with VA TAC’s arbitrary process will be highly deleterious to veterans desiring to do business with the VA and will slowly kill the VOSB/SDVOSB program. Evaluating large business, non-Vet small business, and VOSB’s & SDVOSB’s to determine the competitive range is ludicrous. With VOSB’s & SDVOSB’s as primes they can ensure that non-Vet participation is after the Vets are fed.

“Veteran First” is just that when referencing 38 U.S.C § 8128. Small business concerns owned and controlled by veterans:

“(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a **contracting preference under this title or any other provision of law**, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.”

Congress and the thousands of Veterans who created P.L. 109-461 intend that when it is verified that there is not one VOSB or SDVOSB available to meet requirements then the VA can offer the remaining portion of the requirement to a non-Vet. Not one portion of the requirement should be offered to a non-Vet until the VETS get theirs first.

The TA “reserve” procedure is explained in section M2 which reads:

M.2 BASIS FOR AWARD

1. Any awards to be made will be based on the best overall (i.e., best value) proposals that are determined to be the most beneficial to the Government, with appropriate consideration given to the five (5) evaluation factors: Technical, Past Performance, Veterans Involvement, Small Business Participation Commitment (SBPC) and Price. The Technical factor is significantly more important than the Past Performance factor, which is slightly more important than the Veterans Involvement factor, which is of equal importance to the SBPC factor, which is slightly more important than the Price factor. All non-price factors when combined are significantly more important than the Price factor. To receive consideration for award, a rating of no less than “Acceptable” must be achieved for the Technical factor, all Technical sub-factors, and the SBPC factor. Offerors are cautioned that the awards may not necessarily be made based upon the lowest prices offered. The Government intends to award up to 15 contracts, which will include awards of at least four contracts to Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and at least three contracts to Veteran-Owned Small Businesses (VOSB).

2. The selection of awardees will be accomplished in two steps. In Step One, the Government will select multiple offerors for awards from those proposals included within the competitive range without regard to the size of the offeror. If at least four SDVOSB offerors and three VOSB offerors are selected for award no further progression to Step Two will be required. If either four SDVOSB offerors and/or three VOSB offerors are not selected for award in Step One, large businesses and non-SDVOSB/VOSB small business offerors will be eliminated from further consideration. The Government will award contracts to SDVOSB and VOSB offerors remaining in the competitive range up to a total (combined awards from Steps One and Two) of four SDVOSB contracts and a total (combined awards from Steps One and Two) of three VOSB contracts. If none of the proposals remaining in the competitive range are from SDVOSB or VOSB offerors, the Government reserves the right to make no further awards.

3. In accordance with FAR 52.215-1, offerors are reminded that if the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Up until August 13, 2010 the RFP required that a veteran company be verified by CVE as being a VOSB or SDVOSB. This did not provide sufficient time (17 days) for a non-verified VOSB or SDVOSB to then develop a team strong enough to compete for T4.

Summary:

1. Solicitation VA118-10-RP-0052 procedure for selection of awardees are arbitrary and capricious procedures.
2. VA TAC did mislead and prevented veteran owned companies from participating by requiring CVE verification in order to submit a proposal. The late date of should be judged at requiring at least a 60 day extension of the due date.

Request for Ruling:

The solicitation issued arbitrary and capricious procedures for selection of awardees.

By erroneously requiring CVE verification the solicitation did prevent veteran owned small businesses from forming competitive teams.

Form of Relief requested:

1. It is necessary to require the Department of Veterans Affairs, Technology Acquisition Center to reissue the VA118-10-RP-0052, R--Transformation Twenty-One Total Technology (T4) Final Solicitation under the law located at 38 USC 8127 and 8128.
2. It is also necessary that a reissue of VA118-10-RP-0052 be for a minimum of 60 days for the purpose of allowing veteran owned companies desiring to bid to form a team competitive within the RFP requirements.

Information establishing the timeliness of the protest

This protest is based on the methods used in issuing solicitation VA118-10-RP-0052. The solicitation due date is August 31, 2010 at 1200. This protest is submitted before that date and time.

Contracting Officer:

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Sincerely,



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