

**DEPARTMENT OF VETERANS AFFAIRS**

**Justification and Approval**

**For**

**Exception to Fair Opportunity**

**Acquisition Plan Action ID: VA261-17-AP-1284 (Project 640-16-128; Bldg 530 Site Landscaping and two separate Construction Period Services)**

1. **Contracting Activity:** Department of Veterans Affairs, VISN 21, NCO 21, VA Palo Alto Medical Center. This document is a “Justification for an Exception to Fair Opportunity.”
2. **Description of Action:** NCO 21 proposes to issue a Request For Proposal (RFP) to one Indefinite Delivery Indefinite Quantity (IDIQ) Architect/Engineering (AE) Firm which will result in a firm-fixed price task-order issued on VA261-17-D-0102. AE Firm is; Apogee Consulting Group, 1151 Kildaire Farm Road, Suite 120, Cary NC, 27511. Apogee Consulting Group is a SDVOSB certified firm.
3. **Description of Supplies or Services:** This requirement is for significant landscape design for the open spaces between Buildings 4, 101 & 530. This project will include two construction period services during the separate construction phases of this project. The Independent Government Estimate (IGE) for this project is \$634,783.00
4. **Statutory Authority:** The statutory authority permitting an exception to fair opportunity is Section 41 U.S.C. 4106(c) as implemented by the Federal Acquisition Regulation (FAR) Subpart 16.505 Subpart 16.505(b)(2)(i):  
  
    ( X ) FAR Subpart 16.505(b)(2)(i)(A): The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.  
  
    ( ) FAR Subpart 16.505(b)(2)(i)(B): Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.  
  
    ( ) FAR Subpart 16.505(b)(2)(i)(C): The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.  
  
    ( ) FAR Subpart 16.505(b)(2)(i)(D): It is necessary to place an order to satisfy a minimum guarantee.  
  
    ( ) FAR Subpart 16.505(b)(2)(i)(E): For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a

specified source”. The statutory authority permitting an exception to fair opportunity for this action is 38 U.S.C. 8127(c), known as the Veterans First Contracting Program which provides the authority to directly contract with a Service-Disabled Veteran-Owned Small Business (SDVOSB) or a Veteran-Owned Small Business (VOSB).

( ) FAR Subpart 16.505(b)(2)(i)(F) In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)), contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in 19.000(a)(3). When setting aside orders for small business concerns, the specific small business program eligibility requirements identified in part 19 apply.

5. **Rationale Supporting Use of Authority Cited Above:** On 16 June 2016, the U.S Supreme Court reversed a lower court decision (Kingdomware Technologies, Inc. v. United States) impacting the implementation of the Veterans First Contracting Program. This decision had a direct impact on the IDIQ suites for Architect and Engineering (AE) Services. At that time, NCO 21 utilized a suite of AE IDIQ contracts to issue task orders for both construction design and master planning/study projects. It was determined NCO 21’s IDIQ suites did not meet the ‘Rule Of Two’ in regards to SDVOSB and the Kingdomware case.

On 27 July 2016, NCO 21 management directed there be no additional task order awards for these AE IDIQ’s, as any additional orders would be in violation of VA PPM 2016-05 and the Kingdomware decision. As a result, many AE projects in the solicitation phase were cancelled. Removal of the IDIQ suites from our portfolio of contracting vehicles negatively impacted our ability to meet customer’s needs in a timely manner, and competing each requirement as a FAR Part 36.6 Brooks Act (Public Law 92-582) qualifications based selection was determined not to be an effective way to meet customer needs.

NCO 21 has recently awarded a new suite of 14 AE contracts for design services VISN 21 requirements. During the gap of time between the Kingdomware decision and award on the new IDIQ suite, customer requirements have exceeded our ability to meet their needs. Clearly the Kingdomware decision is an unusual event, and further delay in award of this task order could negatively impact electrical distribution throughout the VA Palo Alto Health Care System.

FAR 16-505 (b)(1) requires each awardee selected in the suite of 14 AE Firms be given fair opportunity for each order exceeding \$3,500 except as noted above. Ordering procedures require requesting competitive proposals from all firms holding contracts, receiving SF330’s for evaluation, and convening a Technical Evaluation Board (TEB) in accordance with FAR 36.602-3. The Source Selection Process, which includes convening a TEB, evaluating each SF330, and conducting negotiations per FAR 36.606 is estimated to take approximately 90 days for a project of this complexity and magnitude.

6. **Efforts to Obtain Competition:** Under the statutory exception to fair opportunity, as specified above, this unusual and compelling urgency authorizes the Government to limit full and open competition.
7. **Actions to Increase Competition:** This exception to fair opportunity is solely due to the unusual and compelling urgency as a result of the cancellation of NCO 21 IDIQ suites as a result of the Kingdomware decision. Utilization of the exception noted above will expedite award for this FY17 NRM requirement. Future task orders to APOGEE will be competed in the manner described in Paragraph 5 above.
8. **Market Research:** The exception to fair opportunity stated above does not require market research.
9. **Determination that Anticipated Cost is Fair and Reasonable:** A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable: The IGE has been developed by a well-qualified VA engineer. IGE will be used to substantiate pricing techniques described in FAR 15.404-1(b)(2)(v) and (vi) and will be used to establish the cost to the Government will be fair and reasonable.
10. **Contracting Officer's Certification:** I certify that the foregoing justification is accurate and complete to the best of my knowledge and belief.

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**Dennis Becker**  
**Contracting Officer, NCO 21**

**Approved by:**

**Branch Chief, Construction Team I:** I certify the justification meets requirements for other than full and open competition.

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**Brett Vegeto**  
**Branch Chief, Construction Team I**