

DEPARTMENT OF VETERANS AFFAIRS

Justification and Approval For Exception to Fair Opportunity Memo

Acquisition Plan Action ID: VA260-17-AP-6992

Purchase Request No.: 668-17-4-064-0046

Solicitation No.: VA260-17-R-0393

1. **Contracting Activity:** Department of Veterans Affairs (DVA), Network Contracting Office (NCO) 20, Construction Branch 2, Vancouver, Washington, proposes to procure the completion of a project under an exception to the Fair Opportunity requirement of FAR 16.505(b)(1).
2. **Description of Action:** The NCO 20 intends to issue a sole source task order against indefinite delivery indefinite quantity (IDIQ) VA260-12-D-0062 with Burton Construction, Inc., a service-disabled, veteran-owned small business (SDVOSB) concern, certified by the DVA's Center for Veteran Enterprise. The task order will be firm fixed price to complete the construction of the Central Processing space and finish the exterior of the Endoscopy space. The work is located at the Mann-Grandstaff VAMC located in Spokane, Washington.
3. **Description of Supplies or Services:** The proposed action is to complete the Central Processing space for its intended purpose and to finish the Endoscopy addition to a warm and lit condition.

In July 2012, contract VA260-12-C-0047 was awarded for the construction of the Endoscopy and Central Processing spaces. In December 2014, the contract was terminated for default. The contractor filed a claim in February 2015. In March 2016, the parties participated in alternate dispute resolution (ADR) in accordance with FAR 33 Protests, Disputes, and Appeals. One result of the ADR was that the termination for default was converted to a termination for convenience, which released the surety from its obligation to complete the work.

This procurement is to finish as much of the project as possible within the remaining amount of funds prior to the commencement of winter weather and severe freeze / thaw conditions.

The total estimated cost for this work is \$2,981,272.00. There are eight possible deductive alternate items totaling \$1,501,828.00.

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 FAR Part 19 apply.

5. **Rationale Supporting Use of Authority Cited Above:** As noted in section 3, above, the contract was terminated in December 2014. The contractor filed a claim two months later. At the time of termination, a portion of the exterior wall of the Endoscopy space was not completed.

The Surety refused to take over the contract and complete the project until the claim was resolved. The Surety's rationale was that if the termination for default was converted to a termination for convenience in the settlement, which it was, then the Surety was not responsible for completing the project.

The VA has taken measures to protect and secure the open portion of the exterior wall from the effects of weather as much as possible; however, there is only so much that could be done.

Including the winter of 2014 and 2015, there have been a total of three winters where the project has been left uncompleted. The cumulative effect of three years of winter weather will soon impact the DVA as follows.

- Susceptibility to mold, which affects the health of the building occupants.
- Structural Damage to the main hospital facility, which is 194,817 gross square feet.
- Unusable Space for efficient operation of the facility and delivery of health care services to the patient.

If the DVA were to provide for fair opportunity, it would be most prudent to complete a full design, which is estimated at twelve weeks, then issue the solicitation. This would push the estimated award of the task order into October or November 2017, which would not allow for on-site work to commence in sufficient time to complete the exterior work of the building.

Conversely, if the DVA were to allow an exception to fair opportunity, a design-build task order could be negotiated and awarded in August or September, allowing for on-site work to commence prior to winter weather. The first phase of on-site work is to close-up the exterior of the building before the onset of winter weather.

6. **Efforts to Obtain Competition:** Except for situations that are urgent and compelling, construction projects are competed (typically, 100% set aside for SDVOSB concerns), whether on the open market or under an IDIQ multiple award contract.
7. **Actions to Increase Competition:** Except for situations that are urgent and compelling, construction projects are competed (typically, 100% set aside for SDVOSB concerns), whether on the open market or under an IDIQ multiple award contract.
8. **Market Research:** The Government's technical experts discussed the various options of sources for performing this work. Construction services are not available from any of the mandatory sources of FAR Part 8. NCO 20 does have a contingent of IDIQ multiple award contracts for construction services with sufficient capacity to perform this work. Of the contractors with an IDIQ contract for the Spokane, Washington, facility, Burton Construction is the most viable contractor for this project. Burton Construction is located in Spokane, Washington, and regularly perform work at the facility. They have a proven knowledge of the facility building systems, have delivered several successful projects at the facility, have established a proven success working with the A/E of record, and are the most knowledgeable about the Spokane, Washington, facility.
9. **Other Facts:** This project presents some challenges that the Government has no control over. These challenges significantly affect the project and its schedule: First, many of the scopes of work may be so small and/or difficult to bid that a General Contractor might find

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it difficult to obtain subcontractors willing to provide a bid. An example of this is the Exterior Insulation/Finish System (EIFS). The remaining work mostly consist of repairing damaged work already installed with a little bit of new work. Most reputable EIFS contractors may look at this small amount of work with a high level of potential problems and simply not bid it. This may cause the General Contractor to have to perform the work, which will likely impact the costs beyond what we have included in our estimate. It may also impact the ability of the Government to obtain manufacturer's warranties on many of the systems. A General Contractor that is familiar with the local area and that has an established, positive reputation with the local subcontractors may have better success in getting subcontractors to bid on these small scopes of work. A Contractor that is unfamiliar with the facility and does not have a track record with the A/E of record has the potential for greater disagreements over what the Contractor should or shouldn't have included in their bids to complete the work which will impact completion of the project on time and on budget.

- 10. Technical and Requirements Certification:** I certify that the supporting data under my cognizance, which are included in this justification, are accurate and complete to the best of my knowledge and belief.



Douglas Hardman
Chief, Facility Management Service
Mann-Grandstaff VAMC

25 Jul 2017

Date

- 11. Determination that Anticipated Cost is Fair and Reasonable:** In accordance with FAR 15.404-1(b)(2) and FAR 15.404-1(e), The contracting officer will conduct price analysis of the contractor's price proposal by comparison to the IGCE and by consideration of the technical analysis which will be performed by the COR.

- 12. Contracting Officer's Certification (required):** I certify that the foregoing justification is accurate and complete to the best of my knowledge and belief.

Charlene Duncan, Contracting Officer
VHA NCO 20 Construction Branch 2

07/25/2017

Date

13. **Approvals:**

- a. **Director of Contracting /Designee (Required over \$150K but not exceeding \$700K):** I certify the justification meets requirements for other than full and open competition.

_____ Date 07/26/2017
Stacia Nunn
NCO20 Director of Contracting

- b. **VHA HCA Review and Approval:** I have reviewed the foregoing justification and find it to be complete and accurate to the best of my knowledge and belief and approve this procurement for other than full and open competition.

_____ Date 1 August 2017
Delia A. Adams, MBA, CPCM
~~Executive Director, Service Area Office West~~
Head of Contracting Activity (HCA)