

**DATE:** 10-23-90

**CITATION:** VAOPGCPREC 96-90  
Vet. Aff. Op. Gen. Couns. Prec. 96-90

**TEXT:**

Vendee Loan Sales

**QUESTION PRESENTED:**

In procuring the services of service providers in securitized transactions involving VA vendee loans where VA directly selects such service providers, must VA follow procurement requirements recited in the Federal Acquisition Regulations (FAR)?

**COMMENTS:**

1. In the sale of its vendee loans VA is involved in complex securitized transactions where certain service providers such as underwriters, attorneys, trustees, and others are employed to complete the transactions. In these sales we understand that time is important in assembling service providers because any delay in the selection of such providers may delay closing of the transactions and may affect adversely VA's ability to replenish its Loan Guaranty Revolving Fund, thereby affecting VA's ability to meet its obligations under the loan guaranty program.
2. You have informed us that VA's financial advisor, Kidder Peabody, Inc. ("Kidder") is of the opinion that to have a general solicitation of service providers would be time-consuming and counterproductive. The financial advisor is familiar with this type of securitized transaction and has considerable experience with the service providers who participate in transactions of this nature. Consequently, Kidder is able to identify those firms which can handle these matters in a competent manner. Kidder recommends identifying qualified firms with experience in these transactions and soliciting bids directly from those firms.
3. You also propose to utilize the financial advisor, as VA's agent, to advise as to the qualified firms which should be solicited and to solicit bids from those firms on behalf of VA. Upon the selection by VA of the firms to participate in the transactions, they would operate under the terms of the solicitation documents and their offers as accepted by VA. You have indicated that the agreements with the service providers will provide that payment for services rendered will only be made if the sale is closed. The loan sale agreement will provide further that the amount necessary for the payment for the services will be deducted from the agreed upon gross consideration in order to arrive at the net consideration which the Trust will pay VA for the acquisition of the mortgage loans.

4. Generally, it is not mandatory to comply with Federal acquisition regulations if payment to a service provider in a transaction is made from nonappropriated funds. Since payment to the service providers is made from funds obtained from the sale of securities to investors which are considered nonappropriated funds and not from the Loan Guaranty Revolving Fund, we agree that following the FAR solicitation procedures in the solicitation and procurement of services in these securitized transactions is not required. Thus, without the requirement for extensive solicitation of service providers, VA may rely upon the supportable advice of its financial advisor to identify qualified service providers whose bids to participate in the transaction would be solicited.

5. Such a practice would satisfy fundamental government contracting principles relative to fairness, competition, and using contracts open to the public. Accordingly, we concur that VA may identify and select service providers, with or without the assistance of the financial advisor, and that the parties to the transaction may be selected from a list of qualified participants provided by the financial advisor, without the need for the extensive bid solicitation procedures mandated by the FAR.

6. You indicate that in certain instances VA may identify the best qualified participants and include the firms in a panel of participants. Under one alternative, selection of the actual service provider for a particular sale would be based upon competitive bidding among the best qualified. Under a second alternative, all firms included in the panel would agree to provide the service at a price specified by VA, and selection of the service provider for a particular sale would be rotated among the panel members. As indicated earlier, in view of the time limitation and since a number of qualified participants will have been identified by the financial advisor, thereby preserving the competitive nature of the selection process, it is our view that both of these alternatives would be acceptable.

7. The third possibility that you mention, in which the two alternatives of employing the best qualified participants are combined, is more complex and would require considerable additional review and consideration. The proposal consists of identifying the best qualified participants through competitive bidding, VA setting an acceptable maximum fee for the service, and then seeking additional competitive bids from the participants for each particular sale where the bids could not exceed the VA maximum. A procedure consistent with this proposal seems to involve the submission of two separate bids by a participant and may be so complex that the ability to administer it fairly may be called into question without more extensive review and consideration. As we are not aware of any similar procedure being implemented in contracts governed by the FAR, and as VA has never established such a procedure in the past, we would not recommend that this method of selecting participants be implemented at this time.

**HELD:**

a. In the sale of VA vendee loans in securitized transactions, it is necessary to utilize the services of certain service providers to complete the transactions. Such service providers are compensated for their services only if the particular sale is completed, and

then directly from the proceeds of the sale of the securities which will be issued to finance the purchase of the vendee loans. The compensation amount is deducted from the agreed upon value of the loans being sold to arrive at the net consideration being paid by the purchaser to VA. Funds which originate from private investors and are utilized to compensate the service providers are not appropriated funds. Since the FAR and VA acquisition regulations (VAAR) apply only to the procurement of goods and services with appropriated funds, these regulations would not apply to these contracts. VA may, therefore, select service providers to participate in the securitization of the VA vendee loans without the need to follow the procedures recited in the FAR and VAAR.

b. It would be appropriate, however, to incorporate into the contracting procedures certain basic government contracting principles. In our opinion, your proposal to utilize the financial advisor to identify qualified service providers who would then compete to perform the transactions would meet the basic principles relative to fairness, competition, and opening the contracts to the public. We would recommend, however, that the procedures employed to select these providers incorporate the FAR standards that would not delay the selection of service providers, as such standards reflect criteria which have been identified as appropriate for the Federal Government procurement process. We are, of course, available to work with you in this regard to assure that all such standards and criteria are satisfied in the particular instance.

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