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GLS-HQ-1784-03
PCTL:DAIngold

MEMORANDUM FOR MARIE MEDECK
DIRECTOR, FIELD OPERATIONS
STAKEHOLDERS PARTNERSHIP, EDUCATION &
COMMUNICATION (SPEC), WAGE & INVESTMENT (W&I)

FROM: Lori R. Larson
Acting Chief, Public Contracts & Technology Law

SUBJECT: Tax Counseling for the Elderly (TCE) Award Ranking Criteria

This memorandum is in reply to questions that were forwarded to us by W&I Counsel. The inquiries range from a request for comments in general on the proposed criteria to more specific matters, all recited below, followed by our answers or comments.

1. "We would like to obtain comments on this criteria [a copy of which is returned with this memorandum] that is planned to be used (if approved) in ranking all the TCE applications received for [fiscal year] 2004."

General Background:

As background information relevant to the TCE program in general and in support of the views expressed in this memorandum, we note that the enabling legislation for the program is Section 163 (hereinafter, "Section 163") of the Revenue Act of 1978, Public Law 95-600, which has been codified as a note under Section 6103 of the Internal Revenue Code (IRC). In 1979, the Service issued TCE implementing regulations, see 44 FR 72113 (December 13, 1979), that remain outstanding and are codified as Subpart H of title 26, Code of Federal Regulations (CFR), Sections 601.801 – 601.806. Publication 1101 (Rev. 6-03), entitled "2004 Application Package and Guidelines for Managing a TCE Program," is – as its name says – the application and guidelines for the 2004 TCE program.

PMTA: 00618

The general tenor of this question, and of the other questions recited below, appears to express a concern about the degree to which selections should be based on a competition, with the evaluative criteria published in advance and shared with prospective recipients. The TCE program's statutory and regulatory authorities, as well as the Service's annually revised publication, when reviewed and considered together, speak directly to this concern.

Section 163 authorizes the Secretary of the Treasury Department "through the Internal Revenue Service, ... to enter into agreements with private or public nonprofit agencies or organizations for the purpose of providing training and technical assistance to prepare volunteers to provide tax counseling assistance for elderly individuals in the preparation of their Federal income tax returns." "Powers of the Secretary" that are expressly mentioned in Section 163 include the authorities "to provide reimbursement to volunteers through such organizations" and "to prescribe such rules and regulations as ... [deemed] necessary."

In the regulations, the following – which is quoted in its entirety notwithstanding its length due to its relevance – is expressly said on the subjects of competitive, and noncompetitive, awards of the cooperative agreements:

Competitive award of cooperative agreements. Cooperative agreements will generally be entered into based upon competition among eligible applicants.

- (1) To be eligible to enter into a cooperative agreement, an organization must be a private or public non-profit agency or organization with experience in coordinating volunteer programs. Federal, state, and local governmental agencies and organizations will not be eligible to become program sponsors.
- (2) Eligible applicants will be selected to enter into cooperative agreements based on an evaluation by the Internal Revenue Service of material provided in their applications. The Service will set forth the evaluative criteria in the application instructions.
- (3) Determinations as to the eligibility and selection of agencies and organizations to enter into cooperative agreements will be made solely by the Internal Revenue Service and will not be subject to appeal.

Noncompetitive award of cooperative agreements. If appropriations to implement the Tax Counseling for the Elderly program are received at a time close to when tax return preparation assistance must be provided or when other factors exist which make the use of competition to select agencies and organizations to enter into cooperative agreements impracticable, cooperative agreements will be entered into without

competition with eligible agencies and organizations selected by the Internal Revenue Service. Determination of when the use of competition is impracticable will be made solely by the Internal Revenue Service and will not be subject to appeal.

26 C.F.R. § 601.802(d) & (e). (*Italics original to the text.*)

Publication 1101, in Section 210 of Subpart II, on page 4 (a copy of which is attached to this memorandum), sets out, as required by the regulation quoted above, "Eligibility and Evaluative Criteria." The Evaluative Criteria should be re-reviewed for the reasons that follow in our reply to the request for comments in general on the ranking criteria that were submitted for our legal review.

Comment:

[REDACTED]

[REDACTED]

[REDACTED]

DP

2. "Can this criteria be shared with the current TCE sponsors to obtain their feedback?"

Answer: See the above comment. The TCE program implementing regulations provide that, "The Service will set forth the evaluative criteria in the application instructions." 26 C.F.R. § 601.802(d)(2). The Service has, in fact, done so. See Publication 1101 (Rev. 6-03), Subpart 200, Section 210, p. 4. The criteria that are used should be in terminology and number those that were published in Publication 1101. Sub-elements or indicia of the listed criteria, if developed and used, should be reasonable and non-arbitrary subcategories or explanations of the criteria that were published in Publication 1101. There would appear to be no need for "feedback" if the criteria that are used are those that were included in Publication 1101.

3. "Is it okay that this ranking criteria is not contained in the application package [Publication 1101 (Rev. 6-03), entitled "2004 Application Package and Guidelines for Managing a TCE Program?"

Answer: The simplest answer to this question is, "no." The Service's regulatory position is that it "will set forth the evaluative criteria in the application instructions." 26 C.F.R. § 601.802(d)(2). The Service has, in fact, done so. See Publication 1101 (Rev. 6-03), Subpart 200, Section 210, p. 4. The criteria that are used should be in terminology and number those that were published in Publication 1101.

4. "Are we legally obligated to share the ranking criteria with prospective sponsors?"

Answer: The Service's regulatory position is that it "will set forth the evaluative criteria in the application instructions." 26 C.F.R. § 601.802(d)(2). The Service has, in fact, done so. See Publication 1101 (Rev. 6-03), Subpart 200, Section 210, p. 4. The criteria that are used should be in terminology and number those that were published in Publication 1101.

Attachments (2): Returned draft criteria
Published criteria (Pub. 1101)

cc: John Cardone (CC:W&I)
Carol Nachman (CC:PA)