



FEMA

July 2, 2019

Ernest B. Abbott
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
901 K Street, N.W., Suite 900
Washington, D.C. 20001

Dear Mr. Abbott,

This is a response to your letter dated April 29, 2019, which inquired about FEMA providing an updated “public notice” to a FEMA Region 6 document dated October 6, 2017, (the October 6 Document). The October 6 Document stated that the Houston-Galveston Area Council (H-GAC) debris removal and monitoring solicitations did not comply with the federal procurement standards found at 2 C.F.R. Part 200.

Previously, via a letter dated April 11, 2018, you had requested that FEMA rescind the October 6 Document. In our response dated July 2, 2018, FEMA advised that although we could not rescind the original analysis, we could update it. That July 2 letter included FEMA’s updated analysis. FEMA reviewed information submitted with your April 11, 2018, letter and determined the areas where those specific solicitations complied with the federal procurement standards and areas where adjustments could be made. The letter discussed HGACBuy’s compliance with full and open competition, socio-economic contracting affirmatives steps, local preferences, required contract clauses, and standards of conduct.

While the October 6 Document became public, it was not intended to serve as public FEMA guidance on H-GAC’s purchasing program. As a rule, FEMA only publicly issues general guidance that is of wide application to all applicant types, rather than discrete guidance for specific purchasing programs such as HGACBuy. Accordingly, FEMA does not intend to publicly issue formal guidance on HGACBuy. FEMA can, however, provide appropriate feedback upon request to assist applicants with achieving compliance, as it did in its July 2 letter. Indeed, we recognize and acknowledge that H-GAC used FEMA’s feedback from the July 2 letter to formulate the two HGACBuy documents that you attached to your April 29, 2019, letter. As we did in our last letter, FEMA welcomes the opportunity to provide feedback to H-GAC on these two documents.

FEMA appreciates H-GAC’s efforts to streamline procurement processes by developing guidance for end users on how they can comply with the federal procurement under grants rules while using HGACBuy. To assist H-GAC and its end users with achieving compliance while

using the HGACBuy purchasing program, we have reviewed the two documents attached to your April 29, 2019, letter and offer the following comments:

HGACBuy Contract Guidance Sheet

- While the Sheet states that HGACBuy advertises solicitations as required by state and federal law, this statement could potentially be overly broad and misleading for two reasons:
 - Considering the variance in state law solicitation requirements, HGACBuy should identify which state's law it is following (we note that the HGACBuy Disaster Recovery Contract Guidance states HGACBuy follows the Texas requirements).
 - H-GAC should clarify that because HGACBuy's solicitations do not result in contracts, but only in a pre-qualified list of vendors, end users cannot use HGACBuy's actions to replace their own solicitation process.
- Likewise, HGACBuy's two-step procurement process as described in the Sheet can be a potential source of confusion as it relates to compliance with the federal rules. The first step in the process, HGACBuy's pre-qualification of contractors with ceiling rates, creates a pre-qualified list, not a contract. The Sheet describes the second step as end users competing individual requirements among at least three contractors on that list. However, HGACBuy should clarify that the end user must issue a solicitation for competition among members on the pre-qualified list as well as contractors that are not on the list.
- Each end user should document its contractor responsibility evaluation. HGACBuy indicates that it completes this step on its end users' behalf. HGACBuy should consider passing this information on to its end users to complete their documentation requirements.
- HGACBuy indicates that it is taking some socioeconomic contracting steps when it "solicits" members for its pre-qualified list. HGACBuy should consider passing this information on to its end users to complete their documentation requirements.
- HGACBuy has procurement policies that address standards of conduct, ethics, and conflicts of interest. HGACBuy should inform their end users that they also should have these procurement policies in place to comply with the federal procurement standards.
- We recommend the Sheet also include a link to the Procurement Disaster Assistance Team's [Contract Provisions Template](#).

HGACBuy Disaster Recovery Contract Guidance

- HGACBuy's Guidance states it has "established" contracts through a "formal sealed competitive proposal process." However, HGACBuy's process results in pre-qualified lists that assist end users as they solicit for services, where the end users then must enter into the contracts. Referring to "contracts" may give end users the impression that the solicitation process is complete.
- To comply with the federal procurement standards, end users must do more than just "survey" three contractors from the HGACBuy pool. As mentioned above, end users must conduct their own solicitation, including vendors that are not part of the list.

- The Guidance indicates that its cooperative purchasing program complies with “state procurement laws applicable to Texas Local Government Code and Texas school districts.” The Guidance should note that end users should ensure that they are complying with their own state law if they are not Texas end users.

Although FEMA does not publicly issue entity-specific guidance on cooperative purchasing, as you note, last year we updated our Fact Sheet on cooperative purchasing. This Fact Sheet addresses one of the points you raised in your April 29, 2019, letter about an H-GAC solicitation for a defined amount of services. FEMA noted that non-state applicants must ensure that cooperative purchasing program solicitations include a clear and accurate description of the scope of work or goods required by the non-state applicant. FEMA also indicated that cooperative purchasing programs that place overly restrictive requirements on solicitations risk noncompliance with the full and open competition requirements. This does not mean, however, that a cooperative purchasing program needs to solicit for a defined amount of services for each end user because it is difficult to exactly predict the level of services needed when a non-state applicant solicits a pre-positioned contract. As such, when soliciting these types of contracts, a non-state entity must detail the types of services within the scope of work and estimate the amount within a range. This approach aligns with the FEMA Administrator’s Strategic Plan to encourage pre-disaster preparation and reduce the administrative burdens that impede impacted communities from quickly receiving the assistance that they need.

We appreciate your engagement on this topic and diligence in obtaining information to assist HGACBuy end users compliance with the federal procurement under grants standards. We encourage HGACBuy and its end users to continue development of their knowledge on the use of HGACBuy and trust the information FEMA has already provided on this topic will be enough to inform further use of HGACBuy for federally-funded contracts.

Sincerely,



George A. Robinson
Regional Administrator