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November 2, 2018

Martha Lakey
Purchasing Technician
Region 7 Education Service Center
1909 North Longview Street
Kilgore, Texas 75662

Re: Region 7 ESC Purchasing Cooperative EDGAR Compliance Opinion

Dear Ms. Lakey:

Thank you for taking the time to provide me with a candid and thorough explanation of the procedures that Region 7 ESC follows in procuring vendors for its purchasing cooperative (the "Coop").

It is my opinion following our discussion of the Coop's procedures, my exploration of the Coop website, and my examination of the documents that you sent to me, including Region 7 ESC's written administrative procurement policies and procedures, that the Coop is intentionally operating in such a manner as to comply with the regulatory framework of both the U.S. Department of Education's EDGAR and the Texas Education Agency's FASRG.

Specifically, I find the following important factors and qualifications exist:

1. Relevant ESC staff understand that, in accordance with Section 7.1 of TEA's November 23, 2015, EDGAR Regulations FAQ document, as modified by the Office of Budget and Management's ("OMB") June 20, 2018, Memorandum for Chief Financial Officers and Heads of Small Executive Agencies, the Coop is required to follow the most restrictive procurement rules currently in effect whether they be federal or state as follows:
 - a. The Coop requests the following two types of bid responses:
 - i. Single source/line item bids, in which vendors offer to provide a particular service or product for a set price and for which an apples-to-apples market price comparison may be conducted as part of the bidding process; and
 - ii. Catalog/Category bids, in which vendors offer discounts against published prices for the vendors' good and services and for which market price analyses may not be conducted as part of the bidding process;
 - b. For micro-purchases below \$3,500, the ESC follows the applicable EDGAR rules

in 2 CFR §200.67¹, and therefore procurements by Coop members using federal funds are permissible for both single source/line item bids and catalog/category bids;

- c. For purchases between \$3,501 and \$49,999, EDGAR requires price or rate quotations from an adequate number of qualified sources, which make the federal rules more restrictive than state procurement law required by the Texas Education Code (see TEA 11/23/2015 New EDGAR Regulations FAQ at §7.1, and TEA 08/28/2018 letter regarding Implementing Statutory Changes to Micro-Purchase and Simplified Acquisition Thresholds under EDGAR), and regarding the purchases within this range, the Coop understands that the following applies:
 - i. Regarding single source/line item procurement, since each such vendor product has been selected by the Coop through a competitive bidding market price analysis, the use of federal funds for purchasing those items is permitted by both Texas state law and EDGAR;
 - ii. Regarding catalog/category procurement, the Coop distinguishes between catalog/category procurement and single source/line item bids as follows on its procurement website:

“Line-Item Bid – A bid process that meets all EDGAR and TEC requirements for members. The award is made by item.

“Single-Source Bid – A bid process that meets all EDGAR and TEC requirements for members. The award is made to only one company.

“Sealed Catalog Discount Bid – A discount bid process that places companies on a *multiple-vendor award* for Region 7 Purchasing Members to utilize.

“Multiple-Vendor Award – Once a sealed *catalog discount bid process* has been completed and awarded by the Region 7 Board of Directors, the *approved vendors* on the award have met the minimum, legal requirements for **members to utilize for pricing.**”

- d. For purchases between \$50,000 and \$149,999,² the state procurement laws in Texas Education Code §44.031 are more restrictive than the federal rules, and must be followed (see TEA 11/23/2015 New EDGAR Regulations FAQ at §7.1, and TEA 08/28/2018 letter regarding Implementing Statutory Changes to Micro-Purchase and Simplified Acquisition Thresholds under EDGAR); and regarding the purchases within this range, the Coop understands that the following applies:
 - i. Regarding single source/line item procurement, since each such vendor product has been selected by the Coop through a competitive bidding market price analysis, the use of federal funds for purchasing those items is permitted by both Texas state law and EDGAR;
 - ii. Regarding catalog/category procurement, the Coop distinguishes between

¹ This threshold was increased to \$10,000 in the National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18) (Public Law 115-91) (Sections 806 and 805). According to the Texas Education Agency “To the Administrator Addressed” letter dated August 28, 2018, these increased thresholds became effective July 1, 2018. Region 7 ESC is opting to apply the lower threshold at the time of this opinion.

² This threshold was increased to \$249,999 effective July 1, 2018

catalog/category procurement and single source/line item bids as follows on its procurement website:

“Line-Item Bid – A bid process that meets all EDGAR and TEC requirements for members. The award is made by item.

“Single-Source Bid – A bid process that meets all EDGAR and TEC requirements for members. The award is made to only one company.

“Sealed Catalog Discount Bid – A discount bid process that places companies on a *multiple-vendor award* for Region 7 Purchasing Members to utilize.

“Multiple-Vendor Award – Once a sealed *catalog discount bid process* has been completed and awarded by the Region 7 Board of Directors, the *approved vendors* on the award have met the minimum, legal requirements for **members to utilize for pricing.**”

- e. For purchases of \$150,000³ and above, EDGAR is more restrictive than state law in regard to the cost or price analysis that must be followed; however, because the exact purchase amounts are only determined by each individual Coop member and not by Region 7 ESC, the cost or price analysis required in 2 CFR §200. 323 must be conducted by that Coop member when this threshold is reached and not by the Coop, and Members are advised as follows on the Coop Website:

“What are the purchase limits using federal funds to remain EDGAR complaint?”

- *Micro-Purchases:* Purchases with federal funds do not require the use of a cooperative awarded vendor, however the micro-purchase threshold must be considered in the aggregate over the entire period of applicable federal grant.
- *Small Purchases:* Purchases through a multiple-vendor by price quote analysis, line-item, or single-source award with federal funds complies with the provisions of EDGAR. The Member itself conducts a price quote analysis of multiple-vendor awards.
 - See Best Value Documentation
- *Simplified Acquisition Threshold:* Purchases with federal funds above the simplified acquisition threshold are only covered through line-item and single-source bids. Multiple-vendor awards do not meet all EDGAR requirements of the SAT.

“What are the purchase limits using state funds to remain TEC complaint?”

- Purchases through a multiple-vendor by price quote analysis, line-item, or single-source award with federal funds complies with the provisions of TEC. The Member itself conducts a price quote analysis of multiple-vendor awards.

³ Id.

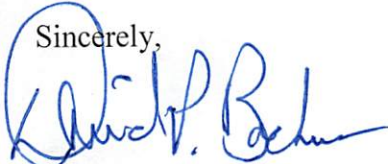
○ See Best Value Documentation”

2. The Coop administrators recognize that it is a best practice for the ESC to have a local policy or procedure identifying a threshold below \$50,000 for which they do not require a competitive process, and the ESC has implemented such a practice by requiring that all purchases between \$3,500 and \$49,999 use a multi-vendor quote procedure documented on a “Best Value Documentation” form (ESC-415), and the Coop makes the ESC-415 form available to Coop members as well;
3. At 2 CFR 200.318(e), EDGAR encourages non-federal entities, including school districts, to enter into state and local intergovernmental or inter-entity agreements, such as the Coop, where appropriate for procurement, or use of common or shared goods and services to foster greater economy and efficiency;
4. EDGAR does not prohibit multiple awards under the same procurement process, which the Coop often does (see TEA 11/23/2015 New EDGAR Regulations FAQ at §7.22);
5. The Coop administrators understand that it must follow the same state and federal procurement rules that would apply if a local education agency (LEA) made the procurement themselves along with an appeals process, full and open competition, and ensuring adequate competition, which the Coop accomplishes as follows:
 - a. For each procurement, the Coop advertises once per week for a minimum of two weeks in each of the 41 counties in which a Coop member’s central office is located in compliance with Texas Education Code §44.031(g);
 - b. The 41 advertisements for bids are followed up by a reasonable period of time for vendor responses;
 - c. Appropriate criteria and weights consistent with Texas Education Code §44.031 are published in each procurement so that cost and price analyses may be conducted;
 - d. The publishing of criteria and weights appear to be consistent with the procedural requirements set forth in EDGAR (2 CFR §200.320) for competitive sealed bids and competitive proposals;
 - e. The published criteria appear to account for the Coop’s commitment to soliciting bids from Historically Underutilized Businesses in accordance with EDGAR (2 CFR §200.321) and Texas law;
 - f. The Coop’s administrative purchasing regulations specifically and clearly address the Coop’s dedication to Fair Value/Fair Competition and to resolving disputes through and are generally in compliance with EDGAR (2 CFR §200.319);
6. Due to the Coop’s inability to predetermine whether a member is using state or federal funds to consummate its purchases through the Coop, the Coop competitively procures every contract in accordance with Texas Education Code §44.031 and/or FASRG, and makes an effort to actively inform members of their responsibilities to perform price quotes or independent procurements in certain circumstances;
7. For single source/line item bids, The Coop’s cost or price analysis includes making an independent estimate of the value of goods or services in the current market before receiving bids or proposals that function as a benchmark for evaluating the reasonableness of future bids and proposals, and ensures that due diligence is completed to determine a fair and reasonable price range for goods and services before procurement begins, and, regardless of the complexity, the estimate is an independent assessment of what the Coop’s members expect to pay for a particular good and/or service based on a reliable source (historical payment, industry standard, market survey), and for catalog/category bids, the Coop informs Members of their responsibilities to obtain price quotes from multiple vendors within the appropriate thresholds;

8. If a Member discovers that the Coop's compliance with EDGAR does not include the lump-sum price for goods or services on which it could not perform a cost or price analysis, the Coop recommends that member(s) are best served by conducting such analysis independently on their own;
9. In all cases wherein member(s) are using federal or state grant funds at or above \$150,000⁴ to purchase goods or services through the Coop, the Coop recommends that members conduct their own independent price or cost analysis in compliance with EDGAR (2 CFR §200.323) before issuing a purchase order or entering into a contract with an awarded vendor.

Based on the findings and qualifications set forth above, the substance of which are in reliance on information received from administrators of the Region 7 ESC purchasing cooperative, it is my opinion that the Coop is intentionally operating in such a manner as to comply with the regulatory framework of both the U.S. Department of Education's EDGAR and the Texas Education Agency's FASRG.

Sincerely,



David P. Backus

⁴ Id.