United States Department of Agriculture

Food and Nutrition Service

Mountain Plains Region

1244 Speer Boulevard
Denver, CO
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Reply to Attn of:

SP-04-21

Subject: Providing Information versus Writing Bid Specifications and Contract Terms

To: STATE AGENCY DIRECTORS - (Special Nutrition Programs) Colorado ED, Iowa, Kansas, Missouri ED, Montana OPI, Nebraska, North Dakota, South Dakota, Utah and Wyoming

Recently, we have been asked 1) whether an equipment manufacturer would violate Department regulation 7 CFR Part 3016.60(b) if the equipment manufacturer writes the bid specifications for a school food authority (SFA) when that manufacturer does not directly sell its products to the SFA, but uses dealers or distributors instead and 2), would a food service management company (FSMC) violate §3016.60(b), if the FSMC drafted a provision to amend an existing SFA-FSMC contract.

Pursuant to Section 12(o) of the Richard B. Russell National School Lunch Act, 42 USC 1760(o), a SFA may "enter into a contract with a person that has provided specification information to the ....[SFA] for use in developing contract specifications for acquiring such good or service."

It is important to remember that the SFA, not the potential contractor, is responsible for complying with statutory and regulatory provisions. If an SFA awards a contract to a potential contractor that has written the specifications used in the SFA's solicitation, the SFA, not the potential contractor, has violated §3016.60(b). The same holds true when an SFA incorporates into its contract, terms and conditions written by the contractor. Attached to this memorandum are questions and answers that address the application of §3016.60(b) in a number of different situations. Please provide this information to all your SFAs. If you have any questions, please contact our office at (303) 844-0354.

Darlene Sanchez

DARLENE SANCHEZ
Regional Director
Special Nutrition Programs

Attachment

Question 1: Do the Part 3016.60(b) provisions (a contract cannot be awarded to a potential contractor that has drafted the bid/proposal specifications) apply to the potential contractor or the public school food authority (SFA)?

Answer: The requirements of 3016.60(b) apply to the SFA, not the potential contractor. The responsibility for complying with program requirements, including the Department's regulations, is conveyed through the state agency-SFA agreement.

Question 2: Does §3016.60(b) prohibit SFAs from attending manufacturer and dealer shows?

Answer: Part 3016.60(b) does not limit the sources from which an SFA may obtain information. As explained in the August 20, 2000 Federal Register (Vol. 65, No. 157, pages 49477), program operators can obtain information from a variety of sources. These sources can include obtaining information by attending shows held by specific manufacturers and dealers and distributors that exclusively market only one manufacturer's products.

Question 3: What is the difference between a potential contractor providing information versus drafting specifications, since the information provided by the potential contractor could be equal to a specification?

Answer: In the broadest terms, providing information can range from simple statements about a product to a technical and detailed description that is equivalent to a specification for that product. SFAs may obtain information that is equivalent to a written specification and still award the contract to the potential contractor providing that information, as long as the SFA develops its own specifications.

Question 4: If the SFA makes minor changes to the specifications provided by a potential contractor, can the SFA award the contract to that potential contractor?

Answer: As stated in the answer to question 3, the SFA, alone, is responsible for developing the specifications that are actually used in its solicitation. The intent of §3016.60(b) is to prevent one potential contractor from obtaining an unfair competitive advantage over other potential contractors. While a minor change to specifications drafted by a potential contractor is generally not going to eliminate this unfair competitive advantage, each case must be reviewed individually. For example, a potential contractor writes the product specifications including a label description that is unique to the potential contractor's product. Except for this label description, the product would be available from a number of other competing suppliers. The SFA, when developing its own specifications, retains all of the specification information but eliminates the restrictive labeling requirement. While this change appears minor on its face, it has opened the procurement to a number of competing potential suppliers.

Question 5: A manufacturer that directly sells it products to customers also uses distributors and dealers. If the manufacturer agrees not to bid on the procurement but

writes the bid specifications, can the SFA still purchase the manufacturer's product from another distributor or dealer?

Answer: If the only product that can meet the bid specifications is the manufacturer's product, then the self-exclusion of the manufacturer from the bidding process is a transparent attempt to circumvent the intent of 3016.60(b).

Question 6: Is the answer to Question 5 different when the manufacturer does not sell its products to customers. Instead, it offers its products through dealers and distributors. Some of these dealers and distributors are exclusive, i.e. selling only that manufacturer's products, while others are not. Can the SFA still purchase that particular product if the SFA restricts its pool of eligible bidders by excluding the manufacturer's exclusive distributors and dealers?

Answer: No. If the only product that can meet the SFA's bid specifications is the manufacturer's product, then excluding manufacturer-specific dealers and distributors from the pool of eligible suppliers would not eliminate the unfair competitive advantage gained by the manufacturer writing the bid specifications.

Question 7: In most requests for proposals, some parts of the contract will not be written until after the negotiation phase has been completed. Usually one party will agree to draft the contract terms representing the results of the negotiations. Can the SFA allow a FSMC to draft these negotiation results and still enter into a contract with that FSMC?

Answer: To prevent any potential violation of §3016.60(b), the SFA should draft the contract terms representing the results of a negotiation. Generally there should be no violation of §3016.60(b) when the SFA directs the FSMC to prepare a written summary of the negotiations and the SFA uses this summary as one source of information to draft the contract terms representing the results of the negotiations.

Question 8: Does §3016.60(b) apply only to formal (exceeding the small purchase threshold) procurements or to all purchases?

Answer: The provisions of §3016.60(b) applies to any acquisition of goods or services using written specifications. Consistent with the principles of Federalism, public SFAs and other public child nutrition program operators must follow their own applicable State and local procurement requirements. Some of these State and local requirements do impose written specification requirements for acquisitions that are at or below the applicable small purchase threshold. If written specifications are used for these small purchase acquisitions, §3016.60(b) would apply.

Question 9: Is there a corresponding requirement to §3016.60(b) for nonprofit SFAs?

Answer: Yes. All nonprofit child nutrition program operators (SFAs, Child and Adult Care Food Program institutions and Summer Food Service Program sponsors) have been

prohibited from awarding contracts to potential contractors that drafted procurement documents since the mid-1970s. That prohibition is stated at §3019.43.

Question 10: A number of State agencies are requiring that solicitations and the resulting cost reimbursable contracts require the return of all discounts and rebates earned on contractor billed purchases. Has FNS changed its position on these discounts and rebates?

Answer: No. FNS' position on this subject remains unchanged from its May 20, 2003, memorandum, Applicability of Federal Requirements to School Food Service Procurements. As stated in that memorandum, "FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget and the Department's Office of the General Counsel have made clear that State agencies and SFAs can impose compliance with net cost requirements through contractual terms."