United States Department of Agriculture
Food and Consumer Service
Mountain Plains Region
1244 Speer Blvd., Suite 903
Denver, CO 80204-3585

APR 30 1996

SP 96-11
Reply to CACFP-465
Attn. of: SFSP-287

Subject: Federal Nonprocurement Suspension and Debarment Waiver Procedures

To: STATE AGENCY DIRECTORS (Child Nutrition Programs) - Colorado ED, Colorado DPHE, Colorado HS, Iowa, Kansas, Missouri ED, Missouri DH, Montana OPI, Montana DPHHS, Nebraska ED, Nebraska SS, North Dakota, South Dakota, Utah, Wyoming ED, Wyoming DHSS

Recently, questions have been presented to us concerning the exception provision of the Department's suspension and debarment regulations at 7 CFR Part 3017 which permits a debarred, suspended or voluntarily excluded person or principal to participate in a particular covered transaction.

Person as defined in 7 CFR Part 3017.205 is any individual, corporation, partnership, association, unit of government or legal entity, however organized. Principals mean officers, directors, owners, partner, key employees, or other persons with primary management or supervisory responsibilities within a company. Principals also include persons who have critical influence on or substantive control over a covered transaction whether or not employed by the company.

The Administrator of the Food and Consumer Service (FCS) may grant an exception permitting a debarred, suspended, or voluntarily excluded person or principal to participate in a specific covered transaction in a FCS program pursuant to 7 CFR Part 3017.215. Since granting an exception is a deviation from the governmentwide policy established by Executive Order 12549 and 7 CFR Part 3017.200, the Administrator must issue a written determination on a case-by-case basis that justifies the reason(s) for permitting the excluded person/principal to participate in the covered transaction. The regulations clearly state that in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently.

Before requesting an exception from the Administrator of FCS, local agencies must make every effort to find a supplier that is eligible to participate in the covered transaction. State Agencies should assist local agencies in these efforts. When extenuating circumstances do exist, e.g., (1) the ineligible bidder is the only bidder; or (2) the ineligible bidder price is <u>significantly</u> lower than the eligible bidder(s) price, the local agency may consider requesting an exception. Please note, that an exception request will not be approved when there is only small to moderate price differences between the ineligible and eligible bidders. Additionally, an exception will not be granted when an excluded bidder has submitted a "low ball" bid. Any bid from an excluded bidder that has the appearance of a "low ball" bid should be submitted to our office, so that we can forward this information to the U.S. Department of Justice.

The following steps must be followed by any local agency seeking to obtain an exception:

1. The local agency must notify the State Agency of the initial bid results and the proposed actions that the local agency will undertake to resolicit bids. At a minimum, this should include publicly soliciting bids a second time and directly contacting as many potential suppliers as possible. The local agency should contact the following to identify potential suppliers for the product(s) under solicitation:

   Public and private schools, military and federal installations, residential institutions, child care centers, county and city correctional and detention facilities, hospitals, grocery stores, and any other commercial or governmental entity within a reasonable geographic area that would be purchasing the same type of product(s) to determine the supplier(s) used by these outlets.

   The State Agency should also provide the local agency with information on all known suppliers that are utilized for State operated programs.

   The local agency may modify its initial bid requirements; however, the local agency may not subdivide its bid requirements to avoid the covered transaction threshold, currently set by regulation at $100,000.

2. If the second solicitation does not result in any eligible bidders or if the bid prices ar still <u>significantly</u> higher, the local agency must obtain State Agency approval for noncompetitive negotiation and contact potential suppliers, other than the ineligible bidder, to negotiate a contract. The local agency must enter into these negotiations in good faith. For example, the local agency must demonstrate a willingness to accommodate alternative delivery schedules, case counts, etc. This does not mean that a local agency should accept changes that decrease the nutritional integrity of the Child Nutrition Programs, i.e., accepting a higher fat product in lieu of a specified lower fat product. The local agency must document the negotiation results, including the reason(s) that the potential suppliers are unwilling or unable to supply the product(s) or accept a lower price.

3. After all efforts have been exhausted for finding an eligible supplier or obtaining lower prices from an eligible supplier, a local agency may seek an exception from the FCS Administrator through the State Agency. The request must be in writing and must contain a justification for the exception and sufficient documentation the demonstrates that the local agency has exhausted all possible efforts to find and eligible or lower priced supplier.

4. The State Agency must endorse the need for an exception in writing, including a certification that the local agency has exhausted all possible avenues to find an eligible supplier or obtain lower prices from an eligible supplier.

Please be aware that complying with the above procedures does not ensure an exception request will be granted. Each case will be reviewed individually and a decision to grant an exception will remain at the discretion of the FCS Administrator. The exception will only be granted when to do so is clearly in the best interests of the Child Nutrition Programs and no other viable alternative exists. Exceptions must be requested and approved by the Administrator of FCS prior to entering into, renewing or continuing a contract with an ineligible entity. The Administrator of FCS will not consider "after the fact" exception request.

Should you have any questions, please call Ed Campbell (303) 844-0355.

Ann C. DeGroat

ANN C. DEGROAT
Regional Director
Child Nutrition Programs