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Food and
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Service

Mountain Plains
Region

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Subject: Procurement Under Grants

To: STATE AGENCY DIRECTORS - (Child Nutrition Programs)

Colorado ED, Colorado DH, Colorado SS, Iowa, Kansas, Missouri ED, Missouri DH, Montana OPI, Montana DPHHS, Nebraska ED, Nebraska SS, North Dakota, South Dakota, Utah, Wyoming ED, and Wyoming DHSS

Procurement rules in 7 CFR Part 3015 (Uniform Federal Assistance Regulations), Subpart S (Procurement) apply to State procurements under their Child Nutrition State Administrative Expense (SAE) and State Administrative Funds (SAF) grants. A recent national audit of Child Nutrition Programs' grants conducted by the United States Department of Agriculture's (USDA's) Office of Inspector General (OIG), raised concerns about the observance of these rules. In particular, the OIG report stressed the need for State agencies (SAs) to conduct procurement actions under their SAE and SAF grants in a manner that promotes competition. This memorandum is to summarize the Federal rules applicable to competitive procurement under Federal grants.

Under 7 CFR 3015.182, "All procurement transactions [under Federal grants], regardless of whether by sealed bids or by negotiation and without regard to dollar value shall be conducted in a manner that provides maximum open and free competition." USDA strongly believes that the programs it administers are best served when procurements under these programs are conducted in accordance with the spirit of this regulation. A SA must take into consideration the following in order to comply with the Federal Procurement Standards:

Avoid Anti-Competitive Practices. Practices that restrict competition include, but are not limited to:

- Geographic preference in source selection. Some State procurement codes require SA's to give certain preferences to bidders or offerors located within the State. Part 3015 does not expressly prohibit this practice. However, rulings by the U.S. Comptroller General and the USDA Office of the General Counsel have established the principle that a geographic preference must present no more than a negligible obstacle to outside bidders or offerors obtaining contracts.

- Unreasonable requirements placed on firms. Any requirement that a firm must meet in order to qualify to do business with the State must be justifiable. Examples of unreasonable requirements include, but are not limited to, unjustifiable location parameters (distance from the State offices or other work location, etc.); and qualifications for a firm's personnel that unjustifiably exceed industry standards for the type of work to be performed.

- Unnecessary experience and excessive bonding requirements.

- Noncompetitive pricing practices between firms or between affiliated companies. Examples of such practices may include collusion to: take turns being the low bidder; allocate the available business among themselves; etc. We recognize you cannot control the behavior of bidders and offerors, but you can report suspected cases of impropriety to applicable State authorities for investigation.

Avoid Organizational conflicts of interest.

- Bidders and Offerors. One or more of a firm's employees may be engaged in other activities or have relationships with other persons that: give the firm an unfair competitive advantage or appear to do so; or make the employees unable, or potentially unable, to objectively perform work under the contract.

- The SA. Conflicts of Interest can occur when the individual(s) responsible for determining bid/proposal responsiveness can be overruled by other individuals within the organization or if the individual responsible for determining responsiveness or any member of that person's family has any personal or corporate ties or any financial interest in any of the offering firms. Federal rules include provisions for a code of conduct covering State staff involved in procurement functions. Such codes are intended to minimize the risk of conflicts of interest within the State organization itself. It is not the intent of this provision to prohibit or discourage business transactions if sound business reasons exist. When an employee(s) has such ties, the final decision should involve officials other than the person(s) with the prohibited ties. The SA should protect itself by fully documenting the process to demonstrate that no impropriety has occurred.

The foregoing discussion is not an exhaustive explanation of competition in State procurements. It is only a summary of the Federal rules for competition in procurements under Federal grants. These Federal rules outline competition requirements and other elements the Federal Government considers essential to any sound procurement system. Another source of information is our Procurement Handbook which was printed and issued in 1990. However, some State procurement codes cover these and additional elements in much greater detail. All State procurements are governed by such State rules, which may require modification for procurements under Federal grants only where there is a conflict.

You should generally direct procurement inquiries to your State procurement officers. If, however, you require an interpretation of the Federal rules, or believe we can be of assistance to you, do not hesitate to call on us.

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Regional Director
Child Nutrition Programs

Avoid Specifying only a brand name product.

- The solicitation should generally describe the product's required performance or other relevant aspects of the desired product or service. It should avoid language that is restrictive; avoid excessive detail and use clear and simple language; avoid characteristics which limit the number of companies which may supply the product or service; do not ask for characteristics which are not available in the market place; review the specifications/descriptions periodically to keep them current.

- When it is impractical or not economical to make a precise description of the product to be procured, a "brand name or equal" description may be used. However, the specific features of the item must be clearly stated. For example, a specific brand and model of a lap top computer might be desirable not only because of its speed and memory capacity, but because it is smaller, lighter and easier to carry during a School Meals Initiative review. A specification should be written for specifying the particular brand and model, "or equal" in terms of speed, memory, capacity, weight and size. It is the responsibility of a vendor to demonstrate that another brand and model meets the desired features.

- Another approach is to document through hands-on testing that a particular brand and model is so clearly preferred by the staff that the procurement specifications can simply call for that brand and model. The documentation should clearly show how the test was conducted; what other brands were tested; and how the test results influenced the final choice. Staff are encouraged to repeat these tests periodically.

Solicit From an Adequate Number of Sources. The requirement for competition applies regardless of the method chosen for a particular procurement.

- Formal Advertising. Procurement by either competitive sealed bidding or competitive negotiation requires the formal, public solicitation of bids or proposals, respectively. A SA must solicit bids or proposals from an adequate number of qualified sources to ensure the effective operation of competitive forces. The Federal rules do not define "adequate" (though State rules may do so). Nevertheless, a SA must take the following steps to maximize the number of responses to its solicitations:

- Mailing the Invitation for Bids or Request for Proposals to known suppliers. As you know, many State and local governmental organizations maintain lists of prequalified sources for this purpose.

- Publishing notices of the procurement in appropriate media. The American Bar Association's (ABA) Recommended Regulations to implement its Model Procurement Code for State and Local Governments suggest publishing in newspapers of general circulation, newspapers of local circulation in the area pertinent to each procurement, industry media, and government publications designed for giving public notice. In addition, many States have designated a specific publication for giving such notice.

- Small Purchases. The solicitation process is less structured under this method than it is under formal advertising, but small purchases must nevertheless be conducted competitively. The SA must obtain price or rate quotations from an adequate number of sources before making its selection. Again, the Federal rules do not define "adequate." However, the ABA's Recommended Regulations suggest obtaining written or oral quotations from not less than three businesses, and making such quotations a part of the procurement record, for any small purchase.

Carefully Observe the Conditions for Procurement by Noncompetitive Negotiation. This method entails soliciting from and negotiating with only one source, or making an award to one source after the procedures outlined above have generated inadequate competition. Because this method results in noncompetitive awards, it is allowed in procurements under Federal grants only in certain circumstances. At least one of the following conditions must apply:

- The item is available from only one source. In this regard, one cannot equate a preferred source with a sole source.

- The public exigency or emergency will not permit a delay resulting from competitive solicitation.

- After solicitation of a number of sources, competition is determined inadequate.

- USDA authorizes a noncompetitive proposal. You should consult this office whenever you have a question whether a noncompetitive procurement under your SAE grant is appropriate.