

**United States Department of Agriculture**

Food and Nutrition Service

# Contracting with Food Service Management Companies:

# Guidance for School Food Authorities

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# Glossary of Terms

For the purposes of this guidance, the term:

**Bidder** means the entity that responds to an Invitation for Bids for the purpose of providing a product or service.

**Buy American** means the "Buy American" provision (in section 12(n) of the National School Lunch Act) requires schools to purchase, to the maximum extent practicable, domestic commodities and products. A domestic commodity or product means an agricultural commodity that is processed in the United States, and a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States. Purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for free and open competition. Any entity that purchases food or food products on behalf of the SFA must follow the same "Buy American" provisions that the SFA is required to follow.

**Code of Federal Regulations (CFR)** means the codification of the general and permanent rules published in the *Federal Register* by the Executive departments and agencies of the Federal government.

**Competitive Proposals (previously known as Competitive Negotiation), i.e., a Request for Proposal,** means a method of procurement whereby a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method.

**Contract** means a formal, legally enforceable agreement between a buyer (client) and a seller (contractor) that establishes a legally binding obligation for the seller to furnish goods and/or services and for the buyer to compensate the seller. A contract must clearly and accurately describe the goods and/or services to be delivered or performed and the terms and conditions of the agreement. In the case of school meals programs, a contract is executed by the authorized representatives of the SFA and the contractor that calls for the provision of services, materials, supplies or equipment by the contractor in accordance with all conditions and specifications in the bid/proposal documents, for a price to be paid by the SFA prior to execution.

**Contract Documents** means the bid specifications, requirements, the IFB and the RFP as applicable, and the resulting contract.

**Cost Reimbursable Contract** means a formal, legally enforceable contract that reimburses the contractor for costs incurred under the contract, but does not provide for any other payment to the contractor, with or without a fixed fee. In a cost reimbursable contract, allowable costs will be paid from the nonprofit school food service account to the

contractor net of all discounts, rebates, and other applicable credits accruing to or received by the contractor.

**Donated Foods** means foods donated, or available for donation, by the United States Department of Agriculture.

**Equipment** means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more. State law or policy may set stricter capitalization thresholds for equipment than the one set by Federal standards. Any SFA may use its own definition of equipment if its definition would at least include all items of equipment as defined here. State agency prior approval is required for all capital equipment items with an acquisition cost of $5,000 or more unless the item is identified on the State agency approved list, if applicable.

**Execution of Contracts** means to complete and formally sign the legal document. For school meals purposes, it is the official signing of the contract by the SFA and the contractor, which indicates that the contract has begun (or has been renewed). Before any contract or amendment to an existing FSMC contract is executed, a State agency must review and approve the contract terms and assure that the SFA has incorporated all State agency required changes into the contract or amendment.

**Fixed-price** means a price that is fixed at the inception of a contract and is guaranteed for a specific period of time. A fixed-price contract may also contain an economic cost adjustment provision tied to a standard index.

**FNS** means the Food and Nutrition Service of the United States Department of Agriculture. FNS administers the nutrition assistance programs of USDA. The mission of FNS is to work with partners to provide food and nutrition education to people in need in a way that inspires public confidence and supports American agriculture.

**Food Service Management Company (FSMC)** means a commercial enterprise or a nonprofit organization that is or may be contracted with by the SFA to manage any aspect of the school food service. [7 CFR 210.2] Under the Summer Food Service Program an FSMC means any commercial enterprise or nonprofit organization with which a sponsor may contract for preparing unitized meals, with or without milk, for use in the Program, or for managing a sponsor's food service operations in accordance with the limitations set forth in §225.15. Food service management companies may be: (a) Public agencies or entities; (b) private, nonprofit organizations; or (c) private, for-profit companies. [7 CFR 225.2] Under the Child and Adult Care Food Program an FSMC means an organization other than a public or private nonprofit school, with which an institution may contract for preparing and, unless otherwise provided for, delivering meals, with or without milk for use in the Program. [7 CFR 226.2].

**Invitation for Bids (IFB)** means a type of solicitation document used in competitive sealed bidding, where the primary consideration is cost and the expectation is that competitive bids will be received and an acceptance (award) will be made to the responsive and responsible bidder whose bid is lowest in price. An IFB is a formal method of

procurement that uses sealed bidding and results in a fixed price contract with or without adjustment factors. The IFB must be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids. Also, the IFB should describe the minimum standards expected of a responsible bidder in measurable terms.

**Meal Equivalency Factor** (MEF) is a statistical tool that is used to convert a la carte sales into a standard of measure, in this case a "meal." The MEF is often used to convert a la carte sales into meal equivalents for billing purposes in fixed price contracts.

**Noncompetitive Proposal –** found in 2 CFR 200.320(f) Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:
(A) The item is available only from a single source;
(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
(C) The awarding agency authorizes noncompetitive proposals; or
(D) After solicitation of a number of sources, competition is determined inadequate.

Proposals must include both price and terms using the same procedures that would be followed for competitive proposals.

**Non-federal entity:** means a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

**Nonprofit School Food Service** means all food service operations conducted by the SFA principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services. Per 7 CFR 210.16(a)(5)& (6) school food authorities must retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims and must retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals.

**Offeror** means the entity that provides an offer in response to a solicitation (either an invitation for bids (IFB) or request for proposals (RFP)), for the purpose of providing a product or service and the price/cost of providing such.

**Processor** means any commercial facility which processes or repackages USDA Foods. However, commercial enterprises that handle, prepare, and/or serve products or meals containing USDA Foods on-site solely for the individual recipient agency under contract are exempt under this definition. For further information see the definition in 7 CFR 250.3.

**Procurement** means the process of obtaining goods and/or services in accordance with applicable rules and regulations.

**Request for Proposal (RFP)** means a type of solicitation document used for the formal procurement method of competitive proposals. The RFP identifies the goods and services

needed and all significant evaluation factors. The RFP is publicized and is used to solicit proposals from a number of sources. Negotiations are conducted with more than one of the sources submitting proposals, and either a fixed- price or cost-reimbursable type contract is awarded, as appropriate. Competitive proposals may be used if conditions are not appropriate for the use of competitive sealed bids.

**Responsible Offeror** means an entity capable of performing successfully under the terms and conditions of the contract.

**Responsive Bid/Proposal** is is one which conforms to all the material terms and conditions of the solicitation.

**School Food Authorities (SFAs)** means the governing body which is responsible for the administration of one or more schools, and has legal authority to operate the National School Lunch Program or School Breakfast Program therein *or* be otherwise approved by FNS to operate the program. The school system superintendent is typically the person authorized by the governing body to sign legal documents for the SFA.

**Sealed Bids, i.e., an Invitation for Bids (IFB),** means a formal method of procurement in which bids are publicly solicited, i.e., through an invitation for bids (IFB), resulting in the award of a firm-fixed price contract to the responsible bidder whose bid is responsive to the IFB, conforms to all the material terms and conditions of the invitation for bids, and is lowest in price. In the case of local and tribal governments, the IFB must be publicly advertised. Bids must be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set in the IFB for opening the bids. For local and tribal governments, the bids must be opened publicly.

**Simplified acquisition threshold** means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods. Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items costing less than the Simplified Acquisition Threshold. The Simplified Acquisition Threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. 1908. As of the publication of this guidance, the Simplified Acquisition Threshold is $150,000, but this threshold is periodically adjusted for inflation. [2 CFR 200.88]

**Sole Source Procurement** –refers to one type of noncompetitive proposal found in 2 CFR 200.320(f)(see Noncompetitive proposal, above); in the Child Nutrition Programs this occurs only when the goods or services are available from only one manufacturer through only one distributor or supplier. Sole source describes a condition of the procurement environment. In a true sole source situation, conducting a traditional solicitation (sealed bid, competitive negotiation or small purchase) is a meaningless act, because the element of competition will not exist. When faced with an actual sole source situation, an SFA must first obtain State agency approval, and then go directly to the one source of supply to negotiate terms, conditions and prices.

**Solicitation** means a document used by the SFA to acquire goods and/or services. Solicitations must incorporate a clear and accurate description of the technical

requirements for the material, product, or service to be procured. Solicitations must also identify all of the contract provisions required by Federal procurement regulations, requirements, terms, and conditions which the offerors must fulfill and all other factors to be used in evaluating the bids or proposals.

**USDA-Foods** means foods purchased by the United States Department of Agriculture. USDA Food Programs support domestic nutrition programs and American agricultural producers through purchases of domestic agricultural products for use in schools and institutions.

**Vendor** means a merchandiser of complete meals, meal components, or raw materials.

# Introduction

Under their agreements with a State agency, school food authorities (SFAs) are responsible for operating the school nutrition programs in schools under their jurisdiction. These programs include the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program for Children (SMP), Afterschool Snacks, Fresh Fruit and Vegetable Program (FFVP), Food Distribution Program (FDP), Seamless Summer Option (SSO), Summer Food Service Program (SFSP), and in some locations, the Child and Adult Care Food Program (CACFP). To assist in carrying out this responsibility, an SFA may contract with a food service management company (FSMC) to manage the food service operation in part, or in all, of these programs and in one, or more, of its schools. The scope of the management must be clearly specified in the solicitation for an FSMC and in the contract awarded to the successful FSMC. However, it is the ultimate responsibility of the SFA to monitor the terms of the contract.

SFAs must comply with existing Federal, State and local procurement requirements when obtaining the services of an FSMC. Federal procurement standards are found in the Code of Federal Regulation (CFR) at 7 CFR 210.21 and at 2 CFR 200.318-326, cost principles in the 2 CFR 200.400 series, and contract provisions in Appendix II to 2 CFR Part 200. Child Nutrition Program regulations applicable to SFAs with FSMC contracts are found in Appendix A. All Program regulations appear as follows: The NSLP regulations appear at 7 CFR 210, the SBP regulations appear at 7 CFR 220, the SMP regulations appear at 7 CFR 215, the SFSP regulations appear at 7 CFR 225, and the CACFP regulations appear at 7 CFR 226. SFAs receiving USDA Foods must also comply with regulations at 7 CFR 250. SFAs must also comply with policy guidance issued related to procurement. Appendix B to this guidance identifies current policy guidance related to procurement and FSMCs.

This guidance is a resource designed to present an overview of the Federal standards for SFAs. As provided in 7 CFR 210.19(e), State agencies may impose additional requirements which meet or exceed the required Federal standards, as long as they are not inconsistent with the Federal standards. State and local procurement standards may also apply in addition to this resource. When the additional requirements are not Federal regulations, the most restrictive regulations, Federal, State, or local, apply. An SFA should contact its State agency for guidance before entering into any procurement for FSMC services.

In order to make an informed decision about contracting with an FSMC, the SFA must determine if the FSMC will provide the SFA with the best food service operation to meet its needs. To make this decision, the SFA should consider a number of issues. These issues include the financial, administrative and operational activities that will be affected by contracting this service. The SFA must allow time to identify and analyze these issues and to prepare for conversion from self-operating the food service to using an FSMC. This process, including the competitive procurement process, may require one full year to complete before the FSMC begins to manage the operations.

In contracting with an FSMC, the SFA must use competitive procurement procedures, solicitation, and contract documents that include required provisions in compliance with Federal, State, and local procurement regulations. Additionally, the SFA must include provisions to adequately safeguard the SFA as well as ensure that the FSMC manages the food service in accordance with

Child Nutrition Program regulations, the SFA-State agency agreement, and the objectives the SFA seeks to achieve. To accomplish this, the SFA must have a sufficient number of knowledgeable staff to:

- Develop, conduct and evaluate the competitive procurement process;
- Negotiate with the FSMC representatives;
- Conduct performance management of the contract through on-site monitoring of the contracted requirements;
- Use and ensure crediting of USDA Foods to the nonprofit food service account (required in fixed-price and cost-reimbursable contracts);
- Ensure the appropriate return of discounts, rebates, and credits (cost-reimbursable contracts) when the solicitation and contract includes purchasing services;
- Coordinate with the FSMC on behalf of the SFA in all aspects of Program and local education agency (LEA) operations, review Claims for Reimbursement;
- Control the food service operations; and
- Perform the responsibilities that must be retained by the SFA.

This resource identifies items that should be considered when deciding whether or not to use an FSMC, the actions that should be taken once a decision to competitively procure the services of an FSMC has been made, and the responsibilities of the SFA after the SFA-FSMC contract is executed. This resource is not all–inclusive. Each SFA and State agency will have unique circumstances that must be considered and evaluated for inclusion in the competitive solicitation process.

# Chapter 1: Responsibilities and Considerations for Using an FSMC

## Considerations for Use of an FSMC

The following steps should be undertaken when considering soliciting the services of an FSMC:

**Analyze Food Service Operation**—conduct an analysis of the current food service operation to determine what method of providing food service best meets the SFA's goals and objectives, i.e.:

- Identify the current cost of operating the food service in relation to the number of reimbursable meals served annually and the average daily participation (ADP) by individual school. These costs include food, labor, supplies, equipment, indirect costs, employee benefits, use of USDA Foods, etc. Sample worksheets may be found in Appendix C-E for conducting this analysis.

- Knowing the operational costs may enable the SFA to make decisions to lower costs without contracting the operations. However, when expenditures exceed revenues, lowering costs may require a reduction in labor, a decision that can be difficult for local boards to make. In this instance, the services of an FSMC in a fixed-price contract for all meal costs may be beneficial to the SFA.

- Analyze all non-fiscal aspects of the current food service operation to determine the impact of utilizing an FSMC. School activities that directly involve the operation and/or improvement of the program may include local wellness policy activities, nutrition goals, and educational activities such as nutrition lessons, school gardens, and farm to school activities.

- Identify what aspects of the operations that might be contracted, such as:

  - program management/administration (fixed-price fee contracts);
  - program management/administration and procurement services for food, supplies, and/or equipment (fixed-price for all, separate fixed-price for each, or cost-reimbursable); or
  - all aspects of the program administration and management including procurement services and management of personnel services (fixed-price per meal, or cost reimbursable contracts).

What are the benefits and consequences of contracting any, or all, aspects of these services?

**Contact the State agency and/or State Distributing Agency**—The State agency is responsible for the oversight of Child Nutrition Programs within a State. Therefore, the State agency must be contacted when an SFA seeks to contract the management of their Program operations with an FSMC. The State agency is required to provide technical assistance, and if registration is required by the State, the State agency must provide a list of registered FSMC operating within the State. Additionally, the State agency may require the

use of a State agency FSMC prototype contract and the State agency may offer training for SFAs and FSMCs regarding the requirements for contracting the management of Program operations in the State. State agencies are also required by regulation to review and approve all FSMC contracts and supporting documentation prior to contract execution.

Contacting the State Distributing agency helps the SFA determine under what situations an FSMC would be subject to the provisions of 7 CFR 250, Subparts C and D with respect to the processing of USDA Foods. The SFA is subject to these provisions and must ensure that the State Distributing agency has reviewed and approved all processing contracts prior to the delivery of USDA Foods for processing.

**Contact Other SFAs**—Contact other SFAs with an FSMC for advice on contracting the management of the operation of the Programs. However, use of the SFA-FSMC contract of another SFA is not advised. All SFA-FSMC contracts may not be in compliance with all Federal, State and local regulations, all aspects of another SFA's Program may not apply, and most of all, SFAs operating in different States may be subject to different State regulations for Program operations and regulations.

### SFA Responsibilities

If the SFA contracts the management of Program operations with an FSMC, the SFA remains responsible for the overall operation of the Programs. This responsibility requires that the SFA retain and maintain direct involvement in the operations, and cannot delegate certain responsibilities to the FSMC. Therefore, contracting with an FSMC does not mean the SFA relinquishes control of the operations to the FSMC. The SFA remains responsible for:

**Preparation of Solicitation and Contract Documents**—The SFA must prepare all solicitation documents, evaluation, and scoring criteria for contract award and obtain State agency approval of the contract prior to contract execution. This includes having the State agency annually review the contract (including all supporting documentation) per 7 CFR 210.19(a)(5). These documents include, but are not limited to:

- the scope of work;
- specifications for products and/or services required in the solicitation;
- contract type to be awarded;
- terms and conditions;
- required contract provisions;
- technical requirements;
- evaluation and scoring criteria for determining the lowest, responsive and responsible bid/proposal for the invitation for bids (IFB) or for a request for proposals (RFP), the most advantageous bid/proposal to the Program with price as the primary consideration, and in compliance with all procurement regulations.

Section 210.16(c)(3)specifically addresses the SFA's development of specifications for each food component or menu item and requires these specifications to be included in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time. In order to ensure objective contractor performance and eliminate unfair competitive advantage, a person that develops or drafts

specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or sub- grantee in conducting a procurement under the USDA entitlement programs specified in 2 CFR 200.319(a) shall be excluded from competing for such procurements.

Also, 7 CFR 210.16(b) requires that the IFB, or RFP, contain a 21-day cycle menu developed in accordance with the provisions in 7 CFR 210.10 for meal pattern requirements. When other Programs are also operated, the cycle menu must meet the meal pattern requirements for all Programs as found in the respective Program regulations for meal patterns, i.e., SBP, FFVP, SFSP, etc. The purpose of the SFA providing the 21-day cycle menu in the IFB or RFP is for evaluation of offers based on the estimated average cost per meal. If the SFA lacks the capacity to prepare a 21-day cycle menu in accordance with the meal pattern(s), with State agency approval, the SFA may include a requirement in the IFB, or RFP, that each FSMC include a 21-day cycle in accordance with the meal pattern(s) to be considered a responsive and responsible offeror. However, the SFA must include how the menu will be evaluated and scored in determining contract award. Recommended criteria include compliance with all meal pattern requirements for components and quantities, dietary specifications, affordability, student acceptability, etc. In addition, to support farm to school efforts, the SFA may also include ability to source from local producers as an evaluation criterion.

**State agency Contract Review**—As noted earlier, the SFA must ensure that the State agency approves the SFA-FSMC contract prior to execution and annually reviews the contract (including all supporting documentation) between any SFA and FSMC prior to execution of the contract, as well as the contract renewal, to ensure compliance with all the provisions and standards set forth in 7 CFR 210 and 250, Subpart D; 2 CFR 200.318-326; as well as regulations for other Programs operated. As set forth in 210.19(a)(6), when the State agency develops prototype FMSC documents for use by the SFA that meets the required provisions and standards, this annual review may be limited to changes made to that contract to ensure contract modifications do not change the scope or exceed the simplified acquisition threshold. The State agency may establish due dates for the submission of the contract, renewal or contract amendment documents. (See the section on Developing Contract Documents.)

Procurement regulations require that all contracts contain provisions that all costs to the Programs be net of applicable discounts, rebates, and applicable credits and identified on all invoices submitted by the FSMC for payment. SFAs must also include contract provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts. These provisions are found in 7 CFR 210.21(f)(1) (specifically addressing NSLP) which includes:

- Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority [210.21(f)(1)(i)].
- The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot

be paid from the nonprofit school food service account); or the contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

- The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;
- The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the SFA may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;
- The contractor must identify the method by which it will report discounts, rebates, and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and
- The contractor must maintain documentation of costs and discounts, rebates, and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

When the State agency provides State agency-approved FSMC prototype contracts meeting the provisions of the governing regulations, all changes the SFA makes to the prototype contract must be reviewed and approved prior to execution and annually by the State agency and prior to execution of the contract.

**SFA Program Oversight**—the SFA remains responsible for Program operations and cannot, therefore, relinquish control of the Program to the FSMC. The SFA must ensure that the food service is in conformance with the SFA's agreement with the State agency and that responsibility for all contractual agreements entered into in connection with the Programs operated remains with the SFA. SFAs must also resolve findings resulting from Program reviews and audits.

**SFA Monitoring**—The SFA must monitor the food service operation through periodic on-site visits in all schools operating the Programs, per 7 CFR 210.16(a)(3), including USDA Foods in accordance with 7 CFR 250.51(d).

**Control the Quality, Extent and Nature of Food Service**—The SFA must retain control of the quality, extent, and general nature of the food service and the prices to be charged to the children for meals. This includes retaining control of the nonprofit school food service account and overall financial responsibility for the Programs operated; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals and non-program foods and meals, i.e., a la carte food services, adult meals, and other food service Programs operated, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements for all Programs operated; conveying menu adjustment requirements to the FSMC; and monitoring implementation of those adjustments. Additionally, any refunds, rebates, discounts, and credits received from

processors must be paid to the SFA for return to the nonprofit food service account.

**Signature Authority**—The SFA must retain signature authority on the agreement between the SFA and the State agency to participate in the Programs operated, including the SFA's free and reduced price policy statement and the Claim for Reimbursement.

**Free and Reduced-Price Meal Process**—The SFA must maintain responsibility for the implementation of free and reduced-price policy in accordance with 7 CFR 245. Such responsibilities include conducting hearings related to such determinations and verification of applications for free and reduced-price meals. An employee of the FSMC may perform for the SFA various aspects of the application, certification, and verification process of eligibility for school meals programs, if a provision for this service is included in the scope of the original solicitation. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are met and the information on the application remains the property of the SFA.

**USDA Foods**—The SFA must retain title to all USDA Foods and ensure that all USDA Foods received by the SFA are made available to the FSMC, including processed USDA Foods and that the value of the USDA Foods in processed end products accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. This provision also applies to any refunds, rebates, discounts, and credits received from processors. The SFA must ensure that the FSMC has credited it for the value of all USDA Foods received for use in the meal service in the school year, in accordance with 7 CFR 250.51(a-d).

**Health Certification**—The SFA must ensure the FSMC maintains applicable health certification(s) and assures that all State and local regulations are being met by an FSMC in preparing or serving meals at an SFA facility.

**Establishment of an Advisory Board**—the SFA must establish and maintain an advisory board composed of parents, teachers and students to assist in menu planning.

**Development of the 21-Day Cycle Menu**—the SFA must develop the 21-day cycle menu for the FSMC IFB or RFP. If the SFA determines, and the State agency approves, that the SFA is unable to develop a cycle menu, the State agency may develop the 21-day cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the original solicitation. The solicitation must identify the criteria that the SFA will use to evaluate the FSMC's menu, such as compliance with the meal pattern(s) for components, quantity, and dietary standards, affordability, nutrition requirements, and appeal to the students.

The solicitation must also identify whether the SFA will provide food specifications or whether the FSMC will develop the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served in Program meals using specifications like grade, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, the specifications must be clearly

identified and described in the SFA solicitation and response to the solicitation by the FSMC.

However, FSMC-developed 21-day cycle menus are only appropriate to use under the competitive proposal method of procurement since, under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the SFA solicitation to competitively procure the services of an FSMC, as doing so could place the FSMC at a competitive advantage. [2 CFR 200.319(a)] The FSMC must adhere to the cycle menu for the first 21 days. Changes thereafter may be made with the approval of the SFA. [7 CFR 210.16(b) (1)]

**Internal Controls and Reports**—The SFA must apply the internal control procedures required by 7 CFR 210.8(a) to the preparation of the monthly Claim for Reimbursement. Also, the SFA must complete all reports as required by the State agency.

## Identify Scope of Contract

Competitive procurement procedures take time and require a great deal of thought and planning. Once the decision to solicit for the services of an FSMC has been made, there are many factors that must be considered. The SFA must:

**Identify Scope of Work**—The SFA must determine the general extent or scope of work to be performed by the FSMC, i.e.

- Identify which Federally reimbursable meal program(s) or nonprofit food service activities the FSMC will be involved in, e.g., NSLP; SBP;SMP; FFVP; SFSP;At-Risk Afterschool Program,;non-program foods and meals, such as a la carte sales during and/or between meal service periods; after hours snacks; and other food service operations, as required (i.e., catering services, if applicable).

- Identify what role, if any, the FSMC will play in procuring products and services on behalf of the SFA, i.e., will the FSMC be acting as the procuring agent for the SFA.

- Decide if the operation of any SFA vending machines will be serviced by the FSMC.

- Decide if the FSMC will cater any special activities and/or be involved in any food service activity outside the nonprofit food service. These special activities may require a separate food service account (7 CFR 210.14(c)) or may be charged to the General Fund to ensure the nonprofit food service account is used exclusively for the operation and improvement of the food service.

- Decide what specific activities relating to USDA Foods the FSMC will be required to perform, in accordance with 7 CFR 250.50(d). Such activities may include, for example:

    1) The competitive procurement of processed end products (i.e., containing USDA Foods) on behalf of the SFA (such procurements must ensure compliance with the requirements in 7 CFR 250, Subpart C, and with

processing agreements between the processor and distributing agency or SFA). Please note that SFAs must confirm their original solicitation and subsequent contract included provisions for the FSMC to accept and further process USDA Foods.

2) The ordering or selection of USDA Foods, in coordination with the SFA.

3) The storage and inventory management of USDA Foods. At a minimum, a year-end inventory of USDA Foods must be conducted; however, SFAs may include in their solicitation more frequent inventory reporting, such as on a monthly basis, to ensure the maximum use of USDA Foods.

4) The payment of processing fees or submittal of refund/rebates requests to a processor on behalf of the SFA, or remittance of refunds for the value of USDA Foods in processed end products to the SFA, in accordance with the requirements in 7 CFR 250, Subpart C.

**Identify Responsible Personnel**—The SFA must identify SFA personnel responsible for managing the SFA-FSMC contract and meeting the SFA's responsibilities, including the existing responsibilities that cannot be delegated to the FSMC and the new responsibilities that will occur under the SFA-FSMC contract. This includes identifying personnel responsible for completing contract performance management (on-site reviews and credits for USDA Foods; if applicable, discounts, rebates, and credits for commercial products and services in cost-reimbursable contracts; compliance with the 21-day cycle menu and meal pattern requirements, components, and quantities, etc.).

**Select Method of Procurement**—The SFA must decide the method of competitive procurement to be used (i.e., sealed bid using an IFB, or competitive proposals, using an RFP) and the type of contract: fixed-price, fixed-price with cost adjustment provisions, or a cost-reimbursable with fixed fee. The procurement methods used must be in accordance with Federal, State and local requirements and fully specify the SFA's needs. See Chapter 2 for details. Be mindful of the method chosen and ensure that the processes associated with that method are employed accurately and in compliance with all procurement regulations. For example, when using the sealed bid process, IFB, all references to a Request for Proposal are inaccurate. The term IFB refers exclusively to an Invitation for Bids through the submission of a sealed bid.

**Develop Solicitation Documents**—In the absence of State agency prototype documents, the SFA must develop all solicitation documents including all specifications for products and services required, terms and conditions, contract provisions, evaluation criteria and scoring to be used to determine contract award (price as the primary criteria), award procedures and pertinent attachments which clearly define the scope of services, as well as products and/or services required as part of the solicitation. For a competitive proposal, using an RFP, all non–negotiable components of the contract must also be included. Regardless of the procurement method, the solicitation documents should be reviewed by the SFA's legal counsel to ensure legal sufficiency as well as to provide the maximum amount of protection possible to the SFA. Additionally, the solicitation must specify the method of procurement being used, i.e., IFB or RFP, as well as the type of resulting contract, i.e., fixed priced or cost

reimbursable.

In accordance with 7 CFR 250.53, as applicable, all contracts must include the provisions relating to use and crediting of USDA Foods to the nonprofit food service account.

In the solicitation and contract, it is crucial for SFAs to provide specific information about the food service operation and all required products and services they are seeking to procure. For example, essential information includes the:

- number of school food service sites including Programs operated;
- student age/grade for meal patterns required;
- number of students enrolled and the average daily participation (ADP);
- methods of meal service (operator-served or buffet/self-service, salad bars, etc.);
- meal service hours at each site;
- meal prices for students and adult meals;
- number of students present during meal services, as applicable;
- variety of educational programs available that will also receive services, for example, pre-kindergarten, half-day kindergarten, adult education centers, alternative schools, or technical programs;
- food preparation facilities, i.e., all sites prepare food vs one central kitchen;
- number of serving days, including a school calendar that includes holidays and no school days for students;
- historical information on the type and value of non-program foods and meals to be offered, such as other food service operations, for example, catering or fundraising. When the FSMC will be responsible for providing the SFA with, or calculating non-program food costs and program revenues for compliance with the 7 CFR 210.14(f), the contract must clearly identify this in the scope.
    - For fixed-price per meal contracts, the SFA must have, and the FSMC must provide, the information on product cost and revenues generated from the sale of non-program foods for the State agency to confirm the SFA is in compliance with this requirement. The information must include food cost of reimbursable meals, food cost from non-program foods, revenue from non-program foods and total revenue.
- quantities/types of USDA Foods available, or ordered for the upcoming year;
- requirement for the FSMC to procure the services for further processing USDA Foods, if applicable;
- pass-through method for crediting the value of USDA Foods to the nonprofit food service account and how this will be reported by the FSMC based on the entitlement value allocated for the upcoming school year;
- SFA's history of using USDA Foods;
- Federal/State reimbursement rates;
- Number of personnel number, including status (full-time or part-time), salaries, and benefits, as applicable;
- history of total revenues and total operating expenses, etc., including if the LEA general fund has subsidized program operations in the past; and
- expectation for continued subsidies or, if unsubsidized, all revenues and profits must be retained exclusively by the SFA nonprofit food service account.

As stated above, the SFA must ensure the solicitation encompasses all anticipated products and services in the solicitation scope and/or provisions to prevent changes to the contract after execution. For example, if an SFA foresees adding additional Programs to their operations during the school year, the solicitation must designate this. Likewise, if the SFA anticipates opening a new school, the anticipated date of this operation and projected enrollment must be included. If schools will be consolidated and closed due to projected decreases in enrollment, this too provides valuable information for how offerors must plan if awarded a contract.

In addition, SFAs may want to indicate its definition of local and prior relationships with local vendors, farmers, or producers; if there are school gardens or farms that grow for the cafeteria; or if there is a desired percentage of the total food budget that the SFA wants to spend on local foods. If supporting local producers or augmenting a district's farm to school efforts are priorities than the district should include these goals in the solicitation for an FSMC.

SFAs must not use information prepared by FSMCs in the IFB or RFP as doing so prohibits the FSMC that prepared that information from the contract award. [2 CFR 200.319(a)] Full and open competition cannot be compromised by allowing potential contractors to provide product and/or service specifications, technical requirements, minimum liability insurance requirements for vendors, or "brand name" products that only one FSMC or its distributor can supply as doing so potentially restricts competition.

FSMC-developed contracts or amendments are never allowed. SFA-FSMC contracts must be developed based on the original solicitation, and if applicable, the negotiations phase in an RFP, to prevent compromising full and open competition. While not recommended, an SFA may invite the successful offeror under a RFP to assist the SFA in finalizing the contract provisions within the estimated cost of the offer and after the successful offeror has been identified. Such changes cannot result in a material change to either the solicitation or contract. The original solicitation language must be retained and additional provisions resulting from the negotiation phase be specified as an attachment. Together these documents constitute the SFA-FSMC awarded contract.

7 CFR 210.19(a)(6) requires each State agency to annually review each contract renewal and/or amendment (including all supporting documentation) between any SFA and FSMC prior to execution (i.e., prior to signature) of the contract to ensure compliance with all the provisions and standards set forth in program regulations as well as the regulations in Part 250, Subpart D governing USDA Foods. This is meant to ensure that contracts do not contain unallowable terms and conditions prior to contract execution.

When developing the contract document, the contract must contain a provision that clearly outlines how all costs will be reported and that all costs will be net of applicable discounts, rebates, and credits (cost reimbursable contracts). In both fixed-price and cost-reimbursable contracts, the provision should outline how the value of USDA Foods will be credited to the nonprofit food service account.

The required contract provisions in 7 CFR 210.21(f)(1-2) requires contractors to provide

SFAs, State agencies, FNS, and other authorized Program personnel with sufficient information to identify allowable and unallowable costs and the amount of all such discounts, rebates, and applicable credits on invoices and bills presented for payment to the SFA. Without these required provisions, the SFA may not receive the value of these discounts, rebates, and credits. It is also important that SFAs monitor the contract to confirm that the contracted FSMC is transparent in the identification of these rebates, discounts, and credits for commercially purchased products in cost-reimbursable contracts and for USDA Foods in both fixed price and cost-reimbursable contracts.

When the SFA is using a prototype contract developed by the State agency that meets the required Federal and State provisions and standards, the annual review by the State agency may be limited to the changes that are made to that prototype contract, or as required due to Program changes in policy or regulations. Each State agency shall review each contract amendment between an SFA and FSMC to ensure compliance with all provisions and standards set forth in all applicable regulations, and before execution of the amended contract by either party, ensure that amendments do not materially change the original solicitation and contract. The State agency may establish due dates for the submission of the contract, contract renewal, or contract amendment documents.

# Chapter 2: Procurement

## Full and Open Competition

The foundation of all procurement, regardless of the method used, is that the procurement be conducted in a manner that provides maximum full and open competition. Procurement procedures must not restrict or eliminate competition. Examples of such restrictions include, but are not limited to:

**Unreasonable Requirements**—placing unreasonable requirements on firms in order for them to qualify to do business, e.g., requiring unnecessary experience and bonding requirements.

**Noncompetitive Pricing Practices**—encouraging or fostering noncompetitive practices, e.g., collusion between firms and noncompetitive awards to consultants that are on retainer contracts**.**

**Organizational Conflicts of Interest**—allowing conflicts of interest to occur. 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 his or her family) has any personal or corporate ties or any financial interest in any of the offering firms. A conflict of interest also occurs when gratuities, favors, or anything of monetary value is solicited or accepted and requires disciplinary action for violations. [2 CFR 200.318(c)(1)] Written standards of conduct covering organizational conflicts of interest are required. [2 CFR 200.318(c)(2)]

**Inappropriate Practices**—includes using information prepared by FSMCs in the solicitation; entering into negotiations with a firm prior to evaluating proposals; negotiating with any bidder at any time when the competitive sealed bid procurement method is used; opening sealed bids in advance of the published open date; and providing only certain firms with the results of pre–bid meetings or releasing the contents of a bid or proposal to other bidders/proposal offerors.

**Insufficient Time**—not allowing bidders/offerors sufficient submission time when advertising/soliciting the IFB/RFP. Complex solicitations, such as those required for the services of an FSMC, may require 45-60 days for the contractor to review, develop, and submit a response.

**Overly responsive**—giving consideration to overly responsive elements of the respondent's bid or response is prohibited. A contract award must be made by evaluating responses against the evaluation and scoring criteria stated in the solicitation with price as the primary consideration. Consideration may, however, be given to responses that add value to the Program; however, it is the SFA's responsibility to be able to substantiate that the item adds value to an element already contained in the solicitation as opposed to being overly responsive, for example, if the RFP does not have specific solicitation for equipment yet the offer includes such. Any questions that arise should be discussed with

the State agency.

**Value-Added responses –** under a RFP when the SFA requests FSMCs respond with goods and services using general terms rather than specifically defining their expectations, the State agency must determine if the FSMC response includes unallowable cost provisions. Revenues from the nonprofit food service account are to be used only for the operation or improvement of the food service.

## Procurement Methods

Once the required procurement method is identified, SFAs must solicit for bids or proposals to ensure they receive the best possible product/service at the lowest possible price. The SFA must identify which procurement method meets its needs most effectively. The two most frequently used methods for soliciting bids/proposals from an FSMC are: Sealed Bids, i.e., an Invitation for Bids (IFB); Competitive Proposals i.e., a Request for Proposal (RFP) (previously known as Competitive Negotiation).

Other methods of procurement found in 2 CFR 200.320 include methods for purchases that fall below the Micro-purchase threshold, the Simplified Acquisition Threshold, and Noncompetitive Proposals. Noncompetitive proposals are limited to four very specific situations as found in 2 CFR 200.320(f).

## Sealed Bids, i.e., IFBs

Procurement of tangible items such as products and services commonly required in Child Nutrition Programs lend themselves to the use of competitive sealed bids. The reason for this is that an SFA can choose a contractor solely on the basis of cost and does not need to negotiate with the bidders. The nature of the product and/or service the SFA is buying is such that, if all bids are responsive to the published scope, specifications, terms, conditions and contract provisions, they will differ along no dimension other than price. The key to awarding an FSMC contract using an IFB is ensuring the SFAs specifications for goods and services supplied are clear. Will the FSMC provide management services only thus, the fixed-price will be a per meal fixed fee for management? If the FSMC will provide a fixed price for a complete meal which includes the cost of food, supplies, and/or labor and management services, the specifications for the food and supplies to be provided must be clear. An example of the language to include is for all food products to comply with the Buy American provision and identify food grade standards, such as Grade A, etc.

**Factors to Consider**—Factors to consider for using sealed bids are:

**Fixed Scope of Services**—the SFA has identified exactly which Programs will be operated, the products and services required and which costs will be contracted to the FSMC. For example, administration, management, procurement of food, supplies, and labor for Program operations, etc.

**Legal Advice Needed**—the SFA is strongly encouraged to obtain legal counsel in the development of the provisions for inclusion in the solicitation using an IFB.

**No Negotiation Involved**—An IFB should be used when the SFA either does not wish to, or lacks the needed experience to negotiate price and contractual responsibilities with the FSMC.

**Competition Available**—The SFA should use an IFB when more than one FSMC is willing and able to compete effectively for the contract.

**Fixed-Price Bids Mandated**—The SFA must use an IFB when the State Agency mandates to do so. SFAs with questions or concerns may contract their State agency for assistance.

**Responsible/Responsive Bidder**—the bid will be awarded to the responsive/responsible bidder that submits the lowest responsive bid.

The SFA must include sufficient information to allow bidders to properly respond to the IFB, thus enabling the SFA to determine responsiveness. The SFA must use responsiveness criteria that can be measured. Normally, this means establishing minimum levels. The IFB must also indicate how bidders will demonstrate compliance with these criteria. For example, if an IFB requires a copy of the food handler's license, the bidder must provide the license with the response to the bid. Open–ended criteria cannot be used in IFBs.

In determining whether a responsive bidder is also a *responsible* bidder, the non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. [2 CFR 200.318(h)]

**Needed Information**—the solicitation must include the time and place for opening bids, as well as any information concerning pre-bid meetings and level of authority and process required to officially award a contract, such as the need for board approval. For SFAs operating a Summer Food Service Program, a bid bond and performance bond are required as outlined in 7 CFR 225.15(m)(5-7). Requirements concerning the bonding requirement, bonding firm, and when the bond(s) must be provided to the SFA must be included in the solicitation.

**Advantages**—Advantages of using competitive sealed bids include:

**Advance Preparation**—the solicitation contains the scope, specifications, terms, conditions, and all the required provisions of a contract. This generally allows the SFA to more accurately estimate costs and assign staff resources well in advance of the effective date of the contract.

As the content of the solicitation contains all required contract provisions, this permits the SFA to arrange for its legal authorities to review the contract provisions for legal sufficiency without the pressures of negotiation.

This also allows for the State agency review prior to publishing the solicitation limiting the State agency review of the final contract in relation to the original solicitation. This expedites the State agency review of the contract which is required prior to executing the contract by all parties.

**Easier Identification of Revenues and Expenses**—fixed-price contracts based on a price per meal/meal equivalency for administration and/or management services and/or for a fixed-price meal charge, more easily permits the SFA to identify anticipated revenues and expenses, as well as the total anticipated cost of the contract.

**No Negotiation Responsibilities**—the SFA is relieved from negotiating both the cost and responsibilities with bidders.

**Simplified Monitoring**—the monitoring of the status of a fixed-price contract is much less complex than a cost-reimbursable type contract. The SFA must conduct on-site monitoring for compliance with all contract provisions such as compliance with the 21-day cycle menu, health and safety certifications, and compliance with the meal service, as well as tracking the value of USDA Foods credited to the nonprofit food service account. Also, monitoring the status of the nonprofit food service account for revenues and expenses is more easily tracked. Transactions are restricted to processing billings from and payments to the FSMC; the FSMC does not pass costs on to the SFAs.

**Use of economic cost adjustment provisions in fixed-price contracts**—as previously noted, policy guidance SP 10-2009, *Economic Price Adjustments in Vendor Contracts*, dated January 23, 2009, allows SFAs and State agencies to include economic cost adjustments tied to a standard index in solicitations using an IFB. Price/cost adjustments tied to the index are beneficial to allow for price changes in the market in contracts with a potential duration of more than one year. This provision allows contract renewal based on a third-party controlled standard price index using the same contract terms as originally solicited avoiding the need to re-bid.

**Disadvantages**—the disadvantages of using competitive sealed bids are:

**Demands Precise Identification of Needs**—if the bid document does not clearly project the scope and identify the products and services requested, the bid prices and the products and services provided by the FSMC may not be reasonable or responsive to the SFA's needs. SFAs are strongly encouraged to identify all Programs to be operated and products and services needed to avoid unnecessary costs and/or contract amendments.

## Competitive Proposals, i.e., RFP

Competitive proposal is effective when the SFA has identified what it expects an FSMC to accomplish. Typically, an SFA would generally choose a competitive proposal when they are procuring products and services that may differ along dimensions other than price alone. This process is most often used when the basis for award is not solely dependent upon the lowest cost but other factors as well; however, price must be the primary consideration.

Unlike the sealed bidding method, the competitive proposal method requires a clear description of the technical requirements, as well as the evaluation and scoring criteria, which allows factors other than price alone to be considered. Many State agencies and SFAs consider these factors as providing flexibility within the stated evaluation and scoring criteria when awarding the contract, as the SFA may engage in discussions with respondents after evaluating their proposals.

The resulting contract from a competitive proposal may be fixed-price (with or without cost adjustment provisions) or cost-reimbursable. Unlike the cost-plus-fixed-fee method, 7 CFR 210.16(c) provides that "cost-plus-a-percentage-of-cost" and "cost-plus-a-percentage-of-income" contracts are prohibited.

**Factors for Consideration**—Factors to consider when using competitive proposals are:

**Technical Skills Needed**—the SFA must possess the technical skills necessary to develop the written evaluation and scoring criteria, complete a review of the responses received to evaluate and score the proposals as specified in the solicitation, and negotiate with proposers. These skills usually include a strong knowledge of procurement and experience with contract negotiation; knowledge of Child Nutrition Program regulations, including allowable and unallowable cost provisions; school food service administration and operation management; as well as financial management of a nonprofit food service account.

**Legal Advice Needed**—while the SFA must prepare a descriptive RFP, the actual contract will not be prepared until after the proposals are evaluated and the final phase of negotiation is complete. As a result, the SFA's legal authority should be available to assure that the proposed contractual language reflects the original solicitation and agreement reached with the FSMC as a result of the negotiation between the successful proposal and the SFA. FNS recommends the final contract be the original solicitation with an attachment of the final FSMC proposal as negotiated. This ensures the final contract is written as originally solicited with additions limited to the FSMCs proposal and final negotiations.

**Monitoring Costs Required**—under a cost-reimbursable contract, the SFA must conduct extensive independent monitoring of the costs incurred under the contract for compliance with the cost principles in the 2 CFR 200.400. Contract performance monitoring must prioritize the return of discounts, rebates, and credits for commercially purchased products and services, and credit for the value of USDA Foods received. SFAs are required to ensure all costs paid from the

nonprofit food service account are allowable and net of discounts, rebates, and credits. SFAs must produce documentation to support their efforts to ensure compliance.

**Careful Preparation of Evaluation and Scoring Criteria**—the criteria that will be used to evaluate the proposals, and their weights (scores), must be carefully prepared and included in the RFP. These criteria must be followed and documented in evaluating the proposals. Negotiations will then be conducted with those who exceed a pre-determined "cut-off" score.

**Inclusion of All Pertinent Information**—while a public opening is not required, an outline of when responses will be opened, evaluated, negotiated, and awarded is a best practice. Additional information needed is the type of award to be made; information concerning pre-bid meetings; level of approval authority required before contract award is final; and process required to officially award a contract, such as the need for board approval of the selected offeror. For SFAs operating a Summer Food Service Program, a bid bond and performance bond are required as outlined in 7 CFR 225.15(m)(5-7). Requirements concerning the bonding requirement, bonding firm, and when the bond(s) must be provided to the SFA must be included in the solicitation.

**Advantages**—the advantages of using a competitive proposal are:

**Assigning Responsibilities**—certain responsibilities of the SFA, as specified in Chapter 1, cannot be delegated to the FSMC. However, those that can be delegated may be included in the solicitation in advance thus allowing the SFA to assign the FSMC some delegable responsibilities. Furthermore, the RFP should clearly identify which responsibilities cannot be delegated.

**SFAs Benefit during Periods of Falling Prices**—RFPs that result in cost-reimbursable contracts should allow the SFA to take advantage of price declines during periods of falling prices. (Fixed-price contracts with cost-adjustments also provide this advantage and are less complex to monitor.)

**Greater Flexibility in Selecting FSMC**—the SFA may have more flexibility in selecting an FSMC based on clear evaluation and scoring provision, as the SFA is not limited to selecting the proposal based on price alone. However, price must be the primary factor identified in the solicitation provision for evaluation and scoring proposals.

**Disadvantages**—the disadvantages of using a competitive proposal may include:

**Complex Monitoring**—extensive monitoring of revenues and expenses under a cost-reimbursable contract may be more complex because:

- The Federal cost principles referenced in the 2 CFR 200.400 series

apply to cost-type contracts. In addition, 7 CFR Section 210.21(f) highlights requirements for contractors billing SFAs under cost-reimbursable contracts. The SFA must review specific items of cost the FSMC charges to the food service account for conformity to these cost principles.

- The timing of expenses will affect the status of the food service account. If the FSMC records expenses on the cash basis of accounting and bills the SFA accordingly, it will bill for goods and services at the time they are purchased. Under the accrual basis of accounting, the FSMC would record expenses and bill the SFA when the goods are actually used in the food service operation.

- The accrual basis of accounting is the preferred method because it measures the benefits received from the FSMC's purchases. Cash basis billing can distort this measurement. It can generate overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The SFA can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the SFA must recalculate the adjustment entry each month.

- All provisions of the contract must be monitored and documented. In addition to the return of discounts, rebates and credits to the nonprofit food service account, the SFA must monitor compliance with the 21-day cycle menu during the first 21 days of the contract, compliance with the meal pattern requirements for all age-grade groups served, and the Buy American provision.

- Additional monitoring will also include compliance with the food safety and storage of purchased and USDA food items; supplies; health and safety certifications; advisory board requirements; and recordkeeping requirements, etc. The extent of the monitoring depends on the specific provisions found in the original solicitation for the FSMC. Documentation of all monitoring activities must be conducted through periodic on-site visits. [7 CFR 210.16(a)(3)] Therefore, monitoring activities more than once during the school year may be required. All monitoring activities must be documented and will be reviewed during the State agency on-site review of SFAs with FSMC contracts and may be completed during the Administrative Review.

**Unbudgeted Costs during Periods of Rising Prices**—RFPs that result in cost-reimbursable contracts may result in higher costs to the SFA during periods of rising prices. Such costs are not tied to a standard index as in a fixed-price contract with cost/price adjustments tied to an index. Therefore, cost-reimbursable contracts lack controls on which costs may be limited during periods of volatile

market prices.

**Potential Reopening of Negotiations**—under a RFP, the contract is prepared based upon the negotiations. The contract should not be finalized until the State agency reviews and approves the document. If deficiencies are noted, it may be necessary for the SFA to reopen negotiations. No contract may be executed by any party without prior written approval by the State agency.

**Essential Skill and Experience**—the contract negotiation process requires that the SFA possess knowledge, skill, and experience in procurement regulations and allowable cost provisions, negotiating, contracting, legal expertise, knowledge and an understanding of the SFA Program operations, and financial management. It may be necessary for the SFA to hire individuals to provide the needed expertise, which can be cost prohibitive. Attempting to negotiate without the needed expertise can result in the SFA entering into a fully enforceable contract that may fail to meet regulatory requirements. It may be also be financially detrimental to the SFA even when provisions are included that require the FSMC to take responsibility for fiscal action in findings of noncompliance identified by the State agency.

**Unexpected or Unidentified Responsibilities**—to the extent that the SFA has not identified whether it or the FSMC will perform certain functions, the SFA may incur duties and related costs not planned or budgeted.

# Chapter 3: Characteristics of a Comprehensive Contract

## Authority

Section 210.16(c) states, in part, "Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met." These provisions are expanded upon below to incorporate Program policies, pertinent regulatory requirements, and guidance. Some of the required provisions are based upon the dollar threshold of the contract. In such cases, the total dollar value of the contract must be considered, e.g., in the case of a cost-reimbursable contract, the total value of the contract must reflect the administrative and management fees as well as the value of direct costs incurred by the FSMC which may be billed to the SFA when the FSMC contract includes services to be performed such as purchasing commercial foods and supplies or hiring and paying for labor to prepare and serve Program meals.

Federal requirements must appear in the contract documents; therefore, Program and government-wide regulations are included in Appendix A. Regardless of whether a provision actually appears in the contract documents, SFAs are required to ensure that the food service is operated in accordance with Program regulations.

SFAs are urged to include additional provisions that supplement those regulatory provisions that must appear in the contract to ensure that the best interest of the SFA is served, provided that such provisions are not inconsistent with Program regulations.

## General Provisions

A comprehensive contractual agreement covers a wide range of areas that delineate both the SFA and FSMC responsibilities. Some areas include compliance with 7 CFR 210.21 including Buy American, the SFA defined geographic preference, requirements that the FSMC obtain the best price and quality of food and supplies, extension of the required controls of USDA Foods to purchased food, and requirements that the FSMC comply with the intent of Federal procurement standards and cost principles in 2 CFR 200; these include prohibiting the use of cost, plus a percentage of cost-type contracts, and prohibiting real or apparent conflicts of interest including purchasing from FSMC-owned, or affiliated vendors. When the solicitation and contract designates that the FSMC will procure the processor(s) for further processing of USDA Foods into end-products, the FSMC must do so based on the value pass-through method specified in the solicitation and contract, and then credit the value of USDA Foods received to the nonprofit food service account.

**Compliance with State and Federal Regulations**—Compliance with regulations is essential for SFAs if they are to participate in the NSLP, the SBP, the SMP, and other Child Nutrition Programs. All contracts should require that the FSMC conduct Program operations in accordance with 7 CFR 210, 215, 220, 225, 226, as applicable; 245, 250; and FNS instructions and policies, as applicable. Incorporation of Program regulations provides a common basis for performance by the FSMC.

The most effective approach is to require the FSMC to be in conformance with the applicable portions of the SFA's agreement under the program. [7 CFR 210.16(a)(2)] Contracts should also contain reference to applicable State regulations, e.g., procurement,

health and sanitation requirements. SFAs may want to consider including an addendum to the SFA-FSMC contract which summarizes Federal and State requirements. (See Appendix G)

**Signature Authority**—the SFA retains signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims. [7 CFR 210.16(a)(5)] The SFA also retains signature authority for their free and reduced price policy statement and the monthly Claim for Reimbursement.

**Free and Reduced Price Meal Process**—The SFA determines eligibility for free and reduced price meals and free milk in accordance with 7 CFR 245. Such responsibilities include conducting any hearings related to such determinations and verification of applications for free and reduced price meals.

An employee of the FSMC may perform for the SFA in various aspects of the application, certification, and verification process of eligibility for school meals programs provided these functions are included in the original solicitation and contract documents. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA and cannot be used or possessed by the FSMC for any use other than to determine eligibility for free or reduced price meals.

**Professional Standards**–Both employees of the SFA and of the FSMC must comply with the requirments contained within the Professional Standards. Consider adding points to the score card for the FSMCs proposed plan for meeting the training requirments.

**USDA Foods**—The SFA's agreement must comply with the regulations for the use of USDA Foods, including:

> **Crediting for the Value of USDA Foods**—In accordance with 7 CFR 250.51(a) and (b), contracts must ensure that the FSMC credits the SFA for the full value of all USDA Foods received for use in the SFA's meal service in the school year, on at least an annual basis, through invoice reductions, refunds, discounts, or other means to be identified on the billing invoice submitted to the SFA for payment. Such requirement includes crediting for the value of USDA Foods contained in processed end products if the FSMC, in accordance with its contract, procures such end products on behalf of the SFA, or acts as an intermediary in passing the value of USDA Foods in such end products on to the SFA. All forms of crediting must include clear documentation of the value of USDA Foods received, regardless of the contract type, fixed price or cost-reimbursable. Crediting is performed by disclosure; i.e., the FSMC credits the SFA for the value of USDA Foods by disclosing, in its billing submitted to the SFA, the savings resulting from the receipt of USDA Foods for the billing period. SFAs are responsible for ensuring the FSMC is ordering and using USDA Foods in the operation based on the entitlement funds allocated. Monthly monitoring of USDA Foods allocated and received is strongly recommended.

**USDA Food Values Required in Crediting**—In accordance with 7 CFR 250.51(c), the SFA must ensure that, in crediting it for the value of USDA Foods, the FSMC uses the USDA Food values determined by the distributing agency, in accordance with 7 CFR 250.58(e), or, if approved by the distributing agency, USDA Food values determined by an alternate means of the SFA's choosing. However, the method of determining the USDA Food values to be used in crediting must be included in solicitation documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted.

**Use of USDA Foods**—In accordance with 7 CFR 250.51(d), the FSMC must use all USDA Foods products such as ground beef, ground pork, and all processed end products, in the SFA's food service, and must use all other USDA Foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the USDA Foods, in the SFA's food service (unless the contract specifically stipulates that the USDA Foods, and not such commercial substitutes, must be used).

**Storage and Inventory Management**—the FSMC must meet the general requirements for the storage and inventory management of USDA Foods in 7 CFR 250.14(b). In accordance with 7 CFR 250.52(a), the FSMC may store and inventory USDA Foods together with foods it has purchased commercially for the SFA's use, unless this is specifically prohibited in its contract. It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of USDA Foods in 7 CFR 250.51(d). Additionally, under cost-reimbursable contracts, the FSMC must ensure that its system of inventory management does not result in the SFA being charged for USDA Foods.

**Recordkeeping and Review Requirements**—The SFA and FSMC must maintain records of receipt of USDA Foods and processed end products, of crediting for the value of USDA Foods, and other records relating to such foods, in accordance with 7 CFR 250.54. The SFA must conduct reconciliation at least annually, unless a more frequent reconciliation is specified in the solicitation and contract, and upon termination of the contract. Reconciliation ensures that the FSMC has credited it for the value of all USDA Foods received for use in the SFA's food service in the school year, including, in accordance with requirements in 7 CFR 250.51(a), the value of USDA Foods contained in processed end products.

**Monitoring**—SFA monitoring of the FSMC should encompass determining whether the food service operation is in conformance with the SFA-FSMC agreement to operate the Program in accordance with Program regulations. Contract language should also confirm the SFA's responsibility to implement internal controls as required under 7 CFR 210.8(a) and to ensure resolution of Program review and audit findings. Monitoring also includes:

- ensuring all contract provisions are being fulfilled, such as local health and sanitation requirements;
- keeping records for menus, standardized recipes, production records, reimbursable meals served for all Programs operated, non-program revenues and expenses, and paid lunch equity calculations, if included;
- invoicing expenses submitted to the SFA; and
- determining the value of USDA Food credits for commercial foods and supplies (cost-reimbursable contracts), if applicable. Monitoring functions may vary depending on the SFA-FSMC contract requirements.

**Use of Advisory Board**—if the SFA wishes to have the FSMC work within the advisory board, contract language should identify this as a specific FSMC responsibility.

**Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms**—SFAs must take all necessary affirmative steps to assure such are used when possible. Affirmative steps must include: placing such qualified businesses on solicitation lists; assuring such businesses are solicited whenever they are potential sources; dividing total requirements, when economically feasible, into smaller quantities to permit maximum participation by such businesses; establishing delivery schedules, where the requirement permits, which encourage participation by such businesses; using the service and assistance, as appropriate, of organizations such as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and requiring the prime contractor, if subcontracts are to be let, to also take these affirmative steps. [2 CFR 200.321]

## Meal Service Provisions

Contracts should also cover the range of services expected from the FSMC. These services include the meal pattern requirements in 7 CFR 210.10, and 220.8, and other Programs, as applicable, for all meals provided by the FSMC and the division of responsibility for the various activities that make up meal services such as food purchasing, storage, inventory, preparation, service, management of the SFA's free and reduced price meal system point of service, and other related activities. This includes:

**Descriptive Information Regarding Food Service**—SFAs are encouraged to provide specific information about the food service. Refer to Chapter 1, Identify Scope of Contract, for examples.

Such information may be provided in a fact sheet that accompanies the IFB/RFP or in either the IFB or RFP. It would not be necessary to re-state in the contract any information that appears in the IFB or RFP, provided that the IFB or RFP is expressly incorporated into the contract. As stated earlier, the language in the original solicitation plus an attachment of the FSMCs response and final negotiation should be what encompass the final SFA-FSMC contract to be executed and submitted to the State agency for approval.

**Types of Meals to be Provided**—Contracts should clearly specify what types of Program meals and other services will be provided (i.e., NLSP, SBP, a la carte, vending machine sales, other non-program food sales and revenues, adult and other non-program meals, special event meals, etc.), and the reimbursement category of those meals. Solicitations conducted by the FSMC should cover all other meal Programs administered by the SFA, e.g., the Child and Adult Care Food Program, the Summer Food Service Program and vended meals provided to other SFAs, unless the SFA intends a separate procurement processes for products and services.

**21-Day Cycle Menu**—under the sealed bid method, the SFA-planned 21-day cycle menu enables the SFA to review each bid for responsiveness to the bid requirements and use the menu as a basis for estimating the average cost per meal.

As previously noted, the SFA should develop the 21-day cycle menu for the FSMC bid/proposal. If the SFA determines and the State agency agrees that the SFA is unable to develop a cycle menu which complies with the meal pattern requirements for all Programs operated, the State Agency may develop the cycle menu or allow responding FSMCs to develop the 21-day cycle menu as long as doing so is included as a requirement in the solicitation document.

The SFA must ensure that its solicitation contains information on how the SFA will be evaluating the FSMC's menu, such as affordability, nutrition and meal pattern requirements, quantity, dietary specifications, student appeal, and if desired, the use of local and seasonal foods and recipes. The solicitation must also identify whether the SFA will be providing food specifications, or, at a minimum, provide guidance on what quality specifications are to be provided when the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu and include specifications using standards such as grade, weight/size, item label, CN label requirements, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation document. The Buy American provision in 7 CFR 210.21(d) must be specified in all contracts that require the FSMC to conduct the procurement for food on behalf of the SFA. When exceptions to the Buy American provision (as provided by SP 24-2016, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program*, dated February 3, 2016) are identified, the FSMC must notify the SFA in advance of foreign substitutes and the reason based on the approved exceptions.

However, FSMC-developed cycle menus are only appropriate to use under the competitive proposal method of procurement since, under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must convey menu adjustment requirements to the FSMC and monitor implementation of those adjustments (e.g., meal pattern changes issued by USDA). The SFA must also approve any changes to the cycle menu after the first 21 days of meal service.

Such changes should include the use of foods that are equivalent to the cost and quality to those submitted in the first 21day cycle menu for meal service.

**Quality, Extent and General Nature of Food Service:**

**Specifications**—Contract language should also include other standards, such as: applicability of USDA major ingredient specifications, use of the Child Nutrition Labeling Program, and applicability of USDA standards about the use of texturized vegetable protein fillers and extenders. Official U.S. grade standards for all meal components are available from: http://www.fns.usda.gov/fdd/specifications-us-grading-standards.

**Samples**—SFAs may include a contract provision that requires the FSMC to refrigerate and maintain samples of food items served. If adopted, the food samples may be maintained for a 48-hour period (or longer, if per the SFA's requirements). The purpose for maintaining these items is for testing in the event of an outbreak of foodborne illness. If adopted, food samples will need to be labeled and dated according to the day served.

**Food Testing**—Contracts should also address food testing by the SFA, such as testing portion sizes and food temperature.

**Competitive Foods**—In accordance with 7 CFR 210.11 and 210.14, SFAs must exert control over the sale of foods sold in competition with school lunch and school breakfast. Included are snacks and beverages sold as part of a la carte meal offering or through vending machines, school stores, fund-raising, and other outlets for non-program foods, etc. SFAs are encouraged to address its position regarding the kinds of foods to be offered, the location of vending machines, the hours of students' access to a la carte and/or vending machines, etc.

**Activities Supporting Meal Services**—Contracts for food services should also contain language about activities that support food services, e.g., food purchasing (for cost-type contracts), menu planning, product inventory and storage, management of, FSMC-provided employees (including hiring, training, and supervising), school gardens and nutrition education, if applicable and included in the solicitation and contact.

The SFA must retain control of the quality, extent, and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR 210 and for other Programs operated; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors for the value of USDA Foods in processed end products must be paid to the SFA. SFA-FSMC contracts that

include provisions for the FMSC to account for non-program revenues and expenses and paid lunch equity calculations must be expressly stated in the solicitation and contract.

**General**—Contracts are strengthened by designating the specific range of services for which the FSMC is responsible. These services may include: purchasing and ordering for commercial foods and supplies, competitively soliciting for processing contracts for processed end products using USDA Foods, overseeing the preparation and serving of meals, processing of meal point of service system requirements, providing meal service at special functions, managing meal ticket sales, and coordinating food delivery to serving sites, etc.

**Financial**—Cost-reimbursable contracts for the FSMC to competitively procure food, supplies, equipment, and services must contain language about payment of vendor bills and accounts, if applicable. A common approach is for the FSMC to assume responsibility for paying these bills and then invoicing the SFA for the costs. This is consistent with a "cost-reimbursable with a fixed-fee" contract payment structure.

Contract language must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. SFAs must be sure to include the following provisions [7 CFR 210.21(f)(1-2)] in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents.

Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority [210.21(f)(1)(i)].

Additionally, the SFA must ensure that contractors provide sufficient information to permit the school food authority to identify allowable and unallowable costs and the amount of all such discounts, rebates, and credits on invoices and bills presented for payment to the school food authority [210.21(f)(1)(ii)(A)]. It is important to note that the contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations [210.21], procurement standards, and cost principles. See 2 CFR 200.318-326, and 2 CFR 400 series.

The contractor must be transparent in their identification of these rebates, discounts, and credits. [210.21(f)(1)(iii-vi)]

Contract language should also specify the requirements for back-up documentation that supports the cost reimbursement portion of the invoice, e.g., supplier invoices for food costs, and time and attendance documentation for labor costs. Additionally, the contract should also specify the management controls and accountability procedures for repayment, if the SFA advances money at the start of the school year, and for administrative costs charged by the FSMC.

**Food Purchasing—**For solicitations that will result in a cost-reimbursable contract and

which will include the service of having the FSMC purchase products and services on behalf of the SFA, the solicitation must clearly identify the range of controls the SFA maintains over purchasing. These include Program requirements in 7 CFR 210.21 for Buy American, the SFAs definition of geographic preference to be applied to purchases for products and services from local sources. Also included are prohibited expenditures, contract provisions, as well as procurement standards in 2 CFR 200.317-326 and cost principles in the 2 CFR 400, which include written procurement procedures, a written code of standards of conduct to prevent real or apparent conflicts of interest, contract types used (cost plus a percentage of cost contracts are prohibited), cost as the sole determinant for purchase, and how discounts, rebates, and applicable credits are passed through to the SFA. In addition, the SFA must ensure that when the FSMC competitively procures the processor for processed end products (i.e., end products that contain USDA Foods) the processor must have signed processing agreements with the State distributing agency or the SFA, in accordance with 7 CFR 250, Subpart C.

If the SFA intends to conduct its own procurement rather than having the FSMC do so, the FSMC contract must not contain clauses that restrict free and open competition for the SFA. Examples of clauses that restrict competition may include, but are not limited to: restricting the SFA's selection of vendors to only FSMC-approved vendors and requiring comprehensive liability insurance in excess of the State requirements.

**Documentation and Audit Provisions—**In the case of cost-reimbursable contracts, the SFA should include in the solicitation and contract a provision requiring an FSMC to demonstrate that the prices it is charging the SFA for food, supplies, etc. are the prices charged by the supplier and the prices are reasonable and necessary. An audit provision in the solicitation and contract is strongly encouraged, as this provision enables the SFA to randomly select invoices and products to confirm the price charged by the vendor is the "cost" paid by the FSMC to the supplier. Audit provisions should include requirements for periodic audits of pricing that may occur on a monthly or quarterly basis, at the discretion of the SFA. The SFA will provide a minimum of a one-week notice of the intent to audit prices. Items selected may vary from one audit to the next; however, selection should include a variety of food types such as meat; milk; bread; produce; and canned, fresh, and frozen fruits and vegetables. Items selected should also represent items of significant cost to the SFA. It is recommended SFAs establish procedures to audit prices early in the contract period. Additionally, SFAs should include provisions which require an FSMC to submit documentation periodically (e.g., monthly) that supports what the SFA was charged for each product purchased and requiring that allowable costs be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the SFA. The FSMC must make all of the documentation available for inspection by the SFA, the State agency, or the Department. [7 CFR 210.21]

In addition, a provision that ensures crediting of the SFA for the value of USDA Foods in processed end products purchased on behalf of the SFA is required. SFAs must track the value of USDA Foods received based on the value pass-through method to ensure all USDA Foods are used and credited to the SFA nonprofit food service account. SFAs

have access to State Distributing Agency systems to track the value of entitlement funds allocated to the SFA and the status of these funds as products are ordered, purchased by USDA, and delivered to the SFA.

**Inventory and Storage**—SFA solicitation and contracts must also include provisions specifying the details of inventory and storage of purchased foods and supplies, as well as USDA Foods. The provisions need to identify the responsible party to account for all products, including USDA Foods. At a minimum, an annual inventory of USDA Foods must be conducted; however, a monthly physical inventory of all products and USDA Foods is a best practice for SFAs to track the value of foods used in their meal service. Food and product inventories are an asset to the SFA representing approximately one-half of their total budgeted expenditures. Therefore, tracking the value and quantity of these products is a valuable component of resource management and should be specified in the solicitation and contract. In the absence of this solicitation and contract provision, the SFA is responsible for conducting the inventory as required annually for USDA Foods. Responsibility should be clearly delineated to ensure that all needed activities are covered, e.g., who is responsible for food storage and maintenance of inventory and for conducting the initial inventory and final inventory.

**Nutrition Education**—if the SFA requires the FSMC to take any responsibility for nutrition education and other non-meal services associated with the meal service component of the FSMC operation, the specific responsibilities should be clearly outlined.

**Farm to School -** SFAs may include in the solicitation requirements of the FSMC to participate or contribute to the farm to school activities at specific sites or district wide. Farm to school programs take on several different forms and can include an array of activities depending on the desires, resources, and culture of the SFA or individual school sites. FSMCs can be part of farm to school efforts in many ways including collaboration with school garden coordinators to help promote garden education in the cafeteria, purchase foods being produced in the school garden(s)/farm(s), source products that meet the SFA's geographic preference, work with producers and/or distributors that meet the SFAs geographic preference, and support school gardening and other farm to school educational activities with nonprofit food service account funds if those activities can improve school food service operations as defined in the memo *Farm to School and School Garden Expenses* (SP 06-2015).

**Nondiscrimination**—The SFA is always required to ensure that no child is discriminated against; therefore, the solicitation and contract must include the Civil Rights Statement. Contract language must not diminish the intent of the nondiscrimination provision. SFAs are encouraged to contact the State agency to obtain the most current nondiscrimination statement required by USDA found in FNS 113 Appendix B.

**Free and Reduced Price Policy**—FSMCs often implement meal-related portions of the free and reduced price policy, such as functions related to the SFAs point of service system, distributing tickets, obtaining accurate meal counts and preventing overt identification of free and reduced price eligible students. Therefore, contracts need to include language requiring the FSMC to comply with the SFA's free and reduced price meal policies.

However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA. The information cannot be used or possessed by the FSMC for any use other than to determine eligibility for free or reduced price meals.

**Other Considerations**—Additional considerations for inclusion in the contract are:

- Menu planning, if applicable, to incorporate USDA Foods as available,including ordering USDA Foods and USDA Foods diverted for further processing as designated by the SFA, and using USDA Foods on a first-in first-out basis.

- In cost-reimbursable contracts with provisions for the FSMC to purchase products on behalf of the SFA, determine whether the FSMC bills the SFA for products when received within the billing period (monthly, or other) or when used during the billing period (monthly, or other).

- The method by which inventories of supplies are handled at the beginning and end of the contract. For example, if the FSMC bills the SFA for supplies "as purchased" rather than "as used", the contract must ensure that the FSMC will purchase back unused supplies from the SFA at the conclusion of the contract in order to prevent over-buying.

## Financial Provisions

SFA-FSMC contracts must include the basis for payments and management of the business relationship. SFA oversight is of particular importance given the range of financial terms and conditions of SFA- FSMC contracts, such as fee structures, cost controls and financial management. The financial provisions must ensure all revenues and expenditures flow through the nonprofit school food service account.

**Fee Structures**—Federal Program regulations permit two types of payment or fee structures in SFA contracts with FSMCs: a fixed-price or fee, with or without an economic cost adjustment clause, and cost-plus-a-fixed-fee. SFAs must ensure that contract provisions are limited to these permissible fee structures only. Economic adjustments should be based on a measurable index such as the Consumer Price Index for All Urban Consumers.

Fixed-price/fee, which is permissible either under an IFB or RFP, takes the form of a unit charge where the unit may be per meal or per time period, typically a year. For example, the FSMC might charge $0.50 per meal or $50,000 per year for management and/or administrative charges. In each instance, the fee charged is expected to cover all management and administrative costs with no additional charges to the SFA. Such fees are to be fixed for the entire contract duration and for renewals unless a provision allowing for periodic cost adjustment is otherwise stated in the original solicitation.

A cost-reimbursable contract, which is not permissible under an IFB, permits the FSMC to

pass food service operating costs through to the SFA and charge an additional fixed- or flat-fee that covers management and administrative costs. The flat-fee must be specified as a cost-per-meal or on an annual basis. It also mustspecify the frequency for payment such as monthly, quarterly, annually. Such fees are to be fixed for the entire contract duration and for renewals unless a provision allowing for periodic cost adjustment is otherwise stated in the original solicitation.

The fee may be described in different ways, e.g., service fee, management fee, administrative fee, or a combination of any of these. A "cost-plus-fixed-fee" contract may also have multiple fees provided these are specified and defined. There may be a per-meal cost and an annual fee. Also, one fee might be called an administrative fee and another, a management or service fee; typically, the administrative fee represents overhead costs and the management fee represents the profits. The fee must be expressed as a dollar value unit per meal or may include details of the total annual cost of administrative or management services included in these fees. The annual cost may be prorated for monthly payment based on the total annual value. Again, such fees are to be fixed for the entire contract duration and for renewals unless a provision allowing for periodic cost adjustment is otherwise stated in the original solicitation.

The contract should have enough detail regarding what is included in the fee structure to ensure that there is no double billing, i.e., same item(s) included in the management fee and administrative fee. Additionally, the contract should specify the cost documentation requirements.

**Control of the Nonprofit School Food Service Account**—Under cost-plus-fixed-fee contracts, all revenue from all meals served including revenue from the a la carte sales, adult meals, and other non-program meals served; rebate payments for processed end products; and any refund for expenses that are charged to an SFA must flow through the SFA's food service account(s). Revenue can be used only for the SFA's nonprofit school food service program and cannot accrue to the FSMC. FSMC expenses that are not billed to the SFA cannot be recorded as expenses to the food service account.

**A La Carte Conversion (Per Meal Equivalency)**—a component of the overall payment structure is the manner in which a la carte food service is counted and valued in a fee per meal contract. In a fee per meal contract, the FSMC is paid on the basis of the number of meals served. In order for an FSMC to be paid for the a la carte food service, many SFAs convert a la carte food service activity into an equitable number of reimbursable lunches based on a set meal price. This meal price is commonly based on the Federal reimbursement rate for meals served "free" plus the entitlement value of USDA Foods which is adjusted annually by USDA. The conversion of the a la carte activity into an equitable number of lunches is termed the "per meal equivalency." Provisions for documenting the requirements in 7 CFR 210.14 regarding non-program revenues and expenses must also be detailed when the FSMC is responsible for providing this documentation.

Contracts must define a per meal equivalency that fairly relates to the cost of producing the reimbursable lunch. One means of obtaining the per meal equivalency is by dividing the total cost of producing a la carte items sold by the unit cost of producing a reimbursable lunch

plus the value of the USDA Foods entitlement rate and bonus foods, as applicable.

Absent cost data, the SFA may obtain a per meal equivalency by dividing the a la carte revenue by the per meal sum of the Federal and State free reimbursement plus the value of USDA entitlement and bonus USDA Foods. A la carte revenue should include all sales, meals, and non-program foods to adults and a la carte sales and all non-program foods sold to students.

**Adult Meals**—Adult meal charges must be established in accordance with FNS Instruction 782-5, Pricing of Adult Meals in the National School Lunch and School Breakfast Programs. Under that instruction, "Breakfasts and lunches served to teachers, administrators, custodians and other adults must be priced so that the adult payment in combination with any per-lunch revenues from other sources designated specifically for the support of adult meals (such as State or local fringe benefit or payroll funds, or funding from voluntary agencies) is sufficient to cover the overall cost of the lunch, including the value of any USDA entitlement and bonus donated foods used to prepare the meal. If cost data are not available, the minimum adult payment should reflect the price charged to students paying the school's designated full price, plus the current value of Federal cash and donated food assistance (entitlement and bonus) for full price meals. In non-pricing programs, the adult charge should be at least the amount of reimbursement received for a free lunch under Sections 4 and 11 of the National School Lunch Act, plus the per-meal value of both USDA entitlement and bonus USDA Foods or, for breakfasts, the rate established for free meals under Section 4 of the Child Nutrition Act, plus the value of bonus commodities."

**Changes in Prices Charged for Meals**—While contract language that ensures that the SFA retains control over pricing is required, language that provides the SFA some formal means of changing prices is recommended, for example, basing the annual calculation on the paid lunch equity tool. When the FSMC is expected to complete this calculation on behalf of the SFA, this must be specified in the original solicitation and contract.

**Special Functions**—When reviewing cost-type contracts, particular attention should be given to the scope and pricing of special functions, which are conducted outside of the nonprofit school food service. Contract language should include a provision that prohibits the use of USDA Foods or processed end products containing USDA Foods for such functions. Separate billings for foods and products purchased and used in special functions is necessary to ensure that school food service costs and special function costs are not intermixed, thus preventing double billing.

**Vending Machines**—Contracts should include a provision which sets forth the SFA's position on vending machines, if applicable. This provision may include the SFA's position on the ownership of the machines, responsibility for maintenance, control of the revenues to be deposited in the SFA nonprofit food service account, the type of foods to be sold as well as other foods sold during the school day.

**Adjustments to Payments**— In order to prevent any material change to a contract, fee

adjustments are not permitted unless provided for in the IFB or RFP and incorporated into the resulting contract. If an adjustment to payment is to occur, the fee structure prescribed in a contract may require adjustment if actual experience does not conform to the assumptions upon which the original fee structure was based. Such cases may include unanticipated drops in enrollment or lowering of Federal reimbursement rates. Contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms as long as scope and contract modification do not create a material change. If the contract is amended, State agency prior review and approval is required. (7 CFR 210.16(a)(10)

Any methods, frequency and basis for fee adjustment upon renewal must be addressed in the original solicitation and contract. The basis must be specified on a standard index, such as the Consumer Price Index for All Urban Consumers.

Contracts that allow an FSMC to renegotiate its flat fee rate when "guaranteed volume" has not been achieved are discouraged because this may inhibit open and free competition. FSMCs may provide an artificially low bid if it were thought that a guaranteed volume could not be achieved. Actual participation is dictated by the quality of the meal service over which the FSMC would have direct control.

**Meal Program Cost Controls**—Cost and reporting controls must exist. Specifying the types of reports required of the FSMC provides an SFA with one important means of monitoring performance in addition to monitoring all other provisions included in the contract. All reports for monitoring must be specified in the original solicitation and contract.

**Program Cost Accounting and Reporting**—As appropriate, SFAs should require periodic reports on operations and state whether the contract is to include monthly profit and loss statements, operating cost reports, daily meal counts, and end of year financial statements. Monthly reporting of the value of products and services purchased and received, including and the value of USDA Foods received at the end of each billing period, is strongly recommended as the best measure for monitoring operating cost and revenues. These provisions must be included in the original solicitation and contract for these services to be provided.

**Control of Food Service Equipment Purchases**—Food service equipment can be a major capital investment for SFAs and equipment purchases over $5,000 require prior approval from the State agency. The addition or replacement of equipment by the FSMC without prior approval from the SFA and State agency presents a risk to the SFA and is therefore unallowable. Contracts should provide the State agency and SFA with final, prior approval authority for the purchase of equipment that is used in storage, preparation and delivery of school meals. Contracts should establish an amortization schedule, if appropriate. Whether or not an amortization schedule is used, title to the property must be vested with the SFA when the equipment is placed in service. Clauses that require the full repayment of unamortized costs incurred by the FSMC when the contract is terminated or not renewed are not permitted. The contract should state that the SFA can retain the property and continue to make payments in accordance with the amortization schedule or

return the property to the FSMC in full release of the unpaid balance. Payment of interest on borrowing, however represented, is an unallowable cost.

"Equipment" defined at 2 CFR 200.33, means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000. Additional information may be found at 2 CFR 200.12 Capital assets, 200.20 Computing devices, 200.48 General purpose equipment, 200.58 Information technology systems, 200.89 Special purpose equipment, and 200.94 Supplies.

When the FSMC is expected to invest in equipment on behalf of the SFA, the original solicitation and contract must include this provision. The amount of the investment and the timeframe must be specified as a total amount over the total life of the contract or prorated annually. Adding these provisions after the original solicitation and contract are awarded may create material changes that will require the solicitation to be re-bid with these provisions included.

If the contract expires or is terminated prior to the complete repayment of the investment, the SFA shall, on the expiration date or within five days after receipt by either party of any notice of termination under this contract, either: deliver the equipment items funded by the investment to the FSMC in full release of the unpaid balance; or retain the property and continue making payments in accordance with the amortization schedule.

**Performance Security**—For SFAs operating a Summer Food Service Program, a performance bond is required. A performance security, or bond, as required by 7 CFR 225.15(m)(6-7), is a method available to an SFA to obtain financial recourse in the event that the FSMC fails to perform in a satisfactory manner or defaults on its duties and responsibilities. The performance security would be specified, for food service contracts over $100,000, an amount not less than ten (10) percent nor more than twenty-five (25) percent of the value of the contract, as determined by the State agency, of the value of the contract for which the bid is made.

A performance security or bond must be from a surety company listed in the most recent U.S. Department of Treasury Circular 570. A $10 million bond for a $1 million contract, however, would be considered excessive bonding requirements and thus restrictive of competition. Bonding requirements must be based on the total bid/proposal cost to be paid from the nonprofit food service account. For example, if the total cost of a proposal is based on administrative fees plus the total direct costs for food, supplies, etc., the performance bond must be based on the total cost of all expenses related to the contract.

**Operating Cost Guarantees and Recovery:**

> **Guarantees**—Contracts for food services may also contain language by which the FSMC guarantees to meet fiscal goals specified by the SFA. Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that

ensures that the FSMC bears responsibility for failure to meet those goals. Returns cannot be contingent upon multi-year contracts as FSMC contracts are for duration of one year with the option of up to four one-year renewals. If the option for renewal is to be considered each year, the best practice is to specify in the original solicitation the SFAs expectations of the guarantee for each renewal year option, if changes in the gurantee will be allowed.

**Loss Recovery**—Contracts are the appropriate place to address liability for losses. Contracts usually address FSMC liability in one of two ways: the FSMC may either be required to reimburse the SFA for the loss without limit or it may reimburse the SFA with limits equal to the management fee or a specified ceiling. Contracts should also address the length of time the SFA can seek recovery of losses. SFAs should seek recovery of any losses for a period of time corresponding to the SFA's period of liability.

**Recovery of Overclaims**—SFAs are encouraged to add a provision in the contract that requires the FSMC to pay the SFA for any overclaims assessed by the State Agency due to FSMC negligence or noncompliance with regulations. This liability should correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the State Agency-established record retention timeframe, whichever is greater. (Refer to the paragraph concerning "Nonperformance" in this chapter.)

**Negligence**—it is also suggested that any waiver of liability by the SFA for damages by the FSMC to equipment or facilities contain an exclusion to this waiver for any damages caused by negligence.

## Other Provisions

**Reporting and Recordkeeping Requirements**—Contract language should ensure that FSMCs maintain appropriate business records, as applicable, e.g., food and supply bid specifications, purchase orders, invoices, and personnel records that relate to the provision of food services to an SFA. SFAs must adhere to the recordkeeping requirements found at 7 CFR 210.15.

The SFA may want to require reports of program income by school and expenditures, meals served to adults, value of a la carte sales, value of USDA Foods including processed USDA Foods, and amount of milk served.

It is recommended that all FSMC records pertaining to the SFA be maintained at the SFA while the contract is in effect, and copies of those records be delivered to the SFA at the conclusion of the contract.

SFAs/FSMCs may retain necessary records in their original form or may scan documents for electronic storage. Contracts should stipulate whether original or electronic records are required and that records are:

- Maintained in such a way that they are easily accessible;
- Available upon demand; and
- Available at the SFA premises rather than at an FSMC location.

**Facilities Management**—Contracts must clearly define the responsibilities for food service facilities and operations, such as providing the meal preparation and service facilities, repair and maintenance of equipment, cleaning of the dining areas, trash removal, exterminator services, and repairs, etc.

**Hiring and Personnel Practices**—Contracts for food services generally contain language about personnel management including hiring practices, management of staff and employee benefits. This should include the following:

**SFA and FSMC Staff**—Contract language should enable the SFA to have final approval authority for the FSMC's Food Service Manager. The professional standards for state and local school nutrition programs personnel as required by the Healthy, Hunger-Free Kids Act of 2010 establishes minimum professional standards for school nutrition personnel who manage and operate the National School Lunch Program and School Breakfast Program. The final rule institutes hiring standards for the selection of State and local school nutrition program directors, and requires all personnel in the school nutrition programs to complete annual continuing education/training. These regulations are expected to result in consistent, national professional standards that strengthen the ability of school nutrition professionals and staff to perform their duties effectively and efficiently.

Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Such practices would be of concern if the SFA sought to hire a member of the FSMC staff rather than renewing the contract. Such provisions would need to designate when individuals are no longer employed by the SFA such as through retirement, resignation, or termination;if employees may be hired by the FSMC;, and how the employee costs will be transferred from the SFA to the FSMC. Without such provisions, changes to contract provisions for handling personnel costs not included in the scope of the original solicitation and contract may represent a material change when the FSMC services are modified to include such changes.

Cross-hiring provisions by either the SFA or the FSMC should be reviewed by the SFA's legal counsel to ensure compliance with Federal and State labor laws.

**Personnel Management**—Contracts should define responsibility for personnel management in some fashion. In general, FSMCs are responsible for personnel management, even when the staff people they are managing are employees of the SFA. Management activities may include employee and labor relations, personnel development, hiring, and termination of management staff. Contracts should also specify responsibility for non-management staff hiring and firing.

**Employee Benefits**—Contracts should define responsibility for employee benefits and refer to the responsibilities placed upon the FSMC with respect to its own employees. The benefits identified in contracts may include medical benefits, insurance, retirement and holiday pay.

**Insurance Requirements**—to protect the interests of the SFA, contracts for food services should also contain language about insurance requirements for the FSMCs. Contracts generally identify three liabilities, i.e., comprehensive general liability, workman's compensation, and vehicle insurance. However, all insurance requirements must be specified as included in the administrative and/or management fee or if the insurance will be billed as a direct cost to the SFA. SFAs are reminded that the cost of unnecessary insurance is unallowable under the Federal cost principles. All costs must be included in the overall price during the evaluation and scoring phase for contract award.

**Nonperformance**—SFAs should add a provision in the contract language that requires the FSMC to pay the SFA any overclaims due to FSMC negligence or noncompliance with regulations, including those overclaims based on review or audit findings. It is recommended that the time limit established in the contract for this provision correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the SA-established record retention timeframe, whichever is greater.

**Contract Duration with FSMCs**—Contract duration is for one year or less, beginning with the date the State agency approved contract is signed by all authorized parties to the contract. Contracts may have the option for renewal not to exceed four one-year renewals.

The basis for renewing the contract, including price increase or decrease provisions, if any, must be stated in the contract and IFB/RFP, as appropriate. Price increase/decrease provisions should be based on a measurable index such as the Consumer Price Index for All Urban Consumers.

**Termination Clause**— Appendix II to Part 200 of Title 2, section B, requires that all contracts in excess of $10,000 must address termination for cause and convenience, including the manner by which it will be effected and the basis for settlement. In addition to the provision of termination for cause, SFAs may also want to include a termination for convenience provision that provides adequate advance notice that would permit the SFA sufficient time to arrange alternate food service if the FSMC exercises the clause.

**Certifications**— Sample template form is available in Appendix H

**Suspension/Debarment -** SFAs must obtain satisfaction that an FSMC is neither excluded nor disqualified before doing business with the FSMC. The uniform Federal suspension/debarment certification has been abolished and the collection of paper certifications is no longer mandatory. Current rules provide greater flexibility in meeting requirements. An SFA may meet the requirements by any one of three methods. They are:

1) Checking the Excluded Parties List System. This is available on the internet at http://epls.arnet.gov
2) Collecting a certification that the FSMC is neither excluded nor disqualified. Since a Federal certification form is no longer available, a State agency or SFA electing this method must devise its own certification form.
3) Including a clause to this effect in the solicitation/contract.

**Lobbying** – Sample form is available in Appendix I
For all contracts in excess of $100,000, set by U.S.C. 403(11):
In accordance with the provisions of 2 CFR 200.450 and Appendix II to Part 200 of Title 2, section I, FSMCs that bid for an award exceeding $100,000 must file the required certification. Such bidder must disclose lobbying activities in connection with school nutrition programs. SFAs should contact their State agency for further information regarding disclosure of lobbying activities.

**Certification of Independent Price Determination** (also known as "non-collusion statement")—While not required by program regulations, it is strongly suggested that SFAs and FSMCs certify that the prices in the bid or proposal have been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition.

**Civil Rights Compliance—**
"In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race,
color, national origin, sex, religious creed, disability, age, political beliefs, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA.

Persons with disabilities who require alternative means of communication for program information (e.g. Braille, large print, audiotape, American Sign Language, etc.), should contact the Agency (State or local) where they applied for benefits. Individuals who are deaf, hard of hearing or have speech disabilities may contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program complaint of discrimination, complete the USDA Program Discrimination Complaint Form, (AD-3027) found online at:
http://www.ascr.usda.gov/complaint_filing_cust.html, and at any USDA office, or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

(1) mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights

1400 Independence Avenue, SW
Washington, D.C. 20250-9410;

(2) fax: (202) 690-7442; or

(3) email: program.intake@usda.gov.

This institution is an equal opportunity provider."

**Specifications**—As a best practice, SFAs may consider a provision stating that any silence, absence or omission from the contract specifications concerning any point must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the SFA is to be used. This provision should be contained in both the IFB/RFP and the contract.

**Conflicts** – A provision must be included containing language regarding how conflicts will be resolved if these arise. Priority must be given that the language in the original solicitation document will prevail over responses and contracts.

# Chapter 4: Advertising

## Solicit Bids

The SFA must solicit bids/proposals in accordance with Federal, State, and local procurement procedures. To comply with Federal standards, State and local procedures must provide a sufficient amount of time, prior to the date for opening of bids/proposals, to allow for the preparation and submission of bids/proposals. If, after solicitation of a number of sources, competition is determined inadequate, a contract may be awarded by noncompetitive negotiation. In such instances, the SFA must maintain documentation of its efforts to solicit bids.

## Time Allowed

Unless otherwise specified by State or local procurement standards, it is suggested that at least 45 days for IFBs and 60 days for RFPs, or more be allowed from the time bids/proposals are solicited to the time that they are due. (It should be noted here that substantially more time overall must be allotted for a procurement under a RFP to allow for such things as proposal evaluation, negotiation, contract development, etc.) Provided that the IFB/RFP has been properly prepared, an adequate amount of solicitation time works to the advantage of both the SFA and the offeror and contributes to an effective and efficient procurement process.

## Advertising Methods

Under either the IFB or RFP procurement method, bids/proposals must be solicited directly from an adequate number of qualified FSMCs and the IFB/RFP must be appropriately publicized in order to provide for maximum open and free competition. To accomplish this, the bids/proposals should at the very least be published in a regional news source. In addition, copies of the complete IFB/RFP should be mailed to prospective offerors, i.e., those FSMCs that are believed to be qualified and that might reasonably be expected to respond to the solicitation. This may include FSMCs that are currently doing business with other SFAs in the State, in adjoining states, or elsewhere. State Agency guidance should be requested and State Agency requirements in this matter must be followed including any FSMC registration requirements. Any amendments or changes to the IFB/RFP as well as any questions and answers resulting from written offeror inquiries or from a pre-bid/pre-proposal meeting must be submitted to all prospective offerors. No information regarding the IFB/RFP should be considered official or binding on the SFA until and unless it is provided in writing.

Publicizing of the IFB/RFP should be accomplished in accordance with Federal/State/local procurement procedures. Generally, this would be done by advertising in major newspapers/trade journals that are normally used by the SFA for publicizing other procurements. It is not necessary that the entire IFB/RFP be published. At a minimum, however, the advertisement should include the IFB/RFP number and date, a brief description of what is being proposed for procurement, and instructions for obtaining a copy of the IFB/RFP.

## Pre-bid/Pre-proposal Meeting

An SFA may be required to conduct a pre-bid/pre-proposal meeting under State/local procurement

procedures or may simply wish to do so, particularly if this is the first procurement of FSMC services by the SFA. It is recommended that such a meeting be conducted and that it be held approximately two weeks after the IFB/RFP is issued but prior to the date bids/proposals are due. There are two important reasons for holding a pre- bid/pre-proposal meeting:

**Provide Information**—to provide information concerning contract performance requirements that may be helpful in the preparation of bids/proposals.

**Answer Questions**—to answer any questions prospective offerors may have regarding the solicitation.

Furthermore, the meeting may bring to light ambiguities, errors, or omissions in the IFB/RFP, which may later be corrected through written amendments to the IFB/RFP. (The meeting should not be held, however, as a substitute for formally amending a deficient or ambiguous specification or to disseminate performance requirements in addition to those contained in the solicitation.) Document the meeting, provide a sign-in sheet for all in attendance, and include a summary of all information shared, questions asked, and answers provided. The information should be sent as a written addendum to the original solicitation. If more than one addendum is required, each addendum should be numbered, and a copy of each addendum should be signed and returned with the bid/proposal as additional supporting documentation of receipt of all requirements for consideration as a responsible and responsive offeror.

Below are items to consider in planning and conducting a pre-bid/pre-proposal meeting:

**Information Regarding Meeting**—information regarding the meeting should be a part of the IFB/RFP solicitation package. It need not be publicly advertised but it must be provided to each FSMC that has received a copy of the IFB/RFP either directly or upon request. The information should include a request that questions be submitted several days prior to the meeting to enable the SFA to do research and prepare to respond at the meeting.

**Recommended Attendance of Offerors**—attendance at the meeting by prospective offerors is strongly recommended but generally should not be required for submittal of a bid/proposal. Follow-up information shared in the meeting should be sent to all prospective offerors to ensure all information has been received in writing before bids/proposals are opened. A signed copy of all addenda should be returned with each bid/proposal to be considered as a responsible and responsive offeror.

**Recommended Attendance of State Agency**—in accordance with State Agency procedures and particularly for first–time FSMC procurements, the State Agency is to attend the meeting and should receive a copy of all information relevant to the meeting.

**Information Provided in Writing**—information provided by the SFA at the meeting should not be considered official until provided in writing to all FSMCs that have received the IFB/RFP. Following the meeting, the SFA should prepare a set of questions and

answers that were covered at the meeting and should mail this information simultaneously to all prospective offerors. A signed copy of all addenda should be returned with the bid/proposal to be considered as a responsible and responsive offeror.

# Chapter 5: Invitation for Bids and Request for Proposals-Openings and Evaluations

It is imperative that Invitation for Bids (IFB) and Request for Proposals (RFP) openings and evaluations are conducted fairly. Inconsistent actions by the individuals responsible for this component of the FSMC procurement can result in bid protests or legal action.

## IFB Openings and Evaluations

Bids must be solicited from an adequate number of known suppliers, and in the case of local and tribal governments must be publicly advertised. In all cases, sufficient time must be provided in order to respond prior to the date set for opening the bids.

Under the sealed bidding method, when bids are received each one must be time-stamped and dated upon receipt. If received in advance of the bid opening, the bids are often deposited in a secure box, safe, or file until the designated opening time. Unsealed bids or bids received after the designated time and date of bid opening are not accepted.

In the case of IFBs, the sealed bid opening will occur at the time and place stated in the IFB, and for local and tribal governments the bids must be opened publicly. It is recommended that the State agency be invited to attend the bid opening.

The purpose of a bid opening is to ensure that bid prices/responses are not altered after being opened. Once the bids are opened, the name of each bidder and bid price must be recorded. Some common examples of other information read aloud for each bid is: products offered, payment terms, Freight On Board point, delivery date, etc. The contract must be awarded to the responsible FSMC whose bid, conforming to all the material terms and conditions, is the lowest price unless there are sound documented business reasons to reject a bid in the best interest of the program. Since SFAs must often receive approval of all contracts by their school board, the SFA may refrain from making a formal award until they receive board approval. The successful bidder should be notified of the SFA's intent to recommend acceptance of the bid, but the bidder must be clearly informed of the need for board approval and, as applicable, the timeframe for receipt of bid protests. Once the timeframe for bid protests has past, or been settled, and board approval is obtained, a written notice of the award should be made to the successful bidder. Again, the SFA shall ensure the State agency reviews and approves the FSMC contract before it is executed. The SFA should contact their legal counsel or comply with State Procurement Codes and Regulations regarding the intent to award and protest period, to identify their responsibilities regarding notification to unsuccessful bidders. At a minimum, unsuccessful bidders should be notified promptly. A copy of the signed contract should also be sent to the State Agency.

## RFP Evaluations

In the case of competitive proposals, a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal.

RFPs should be thoroughly reviewed and subjected to an impartial evaluation. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method. An evaluation and scoring plan must be included in the

solicitation prior to the receipt of any proposals. Among the items that would be included in that plan are:

- Information on Evaluation Team—the size of the evaluation team, the expertise needed on that team, and the names of the team members.

- Scoring System—the scoring system that will be used to evaluate the proposals. This would include the standards to be applied, the relative ranking and weight of each standard, and how the score will be calculated i.e., the sum of the individual team scores or an average of the total team score. Again, price remains the primary consideration when awarding a contract under the competitive proposal method.

- Ancillary Materials—development of scoring sheets, composite scoring forms, and any other forms or letters that may be needed. The scoring sheets should contain the evaluation criteria, standards to be applied, scoring columns and room for comments.

The individuals who will be evaluating the proposals should have sufficient knowledge of the goals of the SFA, experience in school food service, financial management experience (of food service, if possible), and experience in evaluating proposals. It is recommended that the SFA invite the State Agency to attend the evaluation of the proposals.

Proposals must not be opened or reviewed until after the due date established in the RFP. The person responsible for receiving the proposals must safeguard them in order to prevent unauthorized disclosures. It is recommended that all solicitations remain open for a minimum of 45-60 days to allow vendors sufficient time to respond and to promote fair and open competition.

On the date established for opening and evaluating the proposals, each member of the evaluation team should score each proposal independently. If the RFP allows alternative proposals, care must be taken to ensure these address the basic guidelines established in the RFP. Proposals should not be compared to one another. Proposals that fail to address all requirements are unresponsive and cannot receive further consideration. Therefore, the team members should be instructed to use a pass-or-fail basis for eliminating unresponsive proposals, and then use the pre-established scoring system for evaluating the responsive proposals.

If oral presentations are a component of the RFP, great care must be taken to ensure the presentation is scored only for its content. Presentations must be ranked against measurable standards. The team members should be instructed to evaluate the substance of the presentation. Offerors must not be allowed to alter or amend their proposals through the presentation process.

Proposals must be evaluated using the weighted criteria stated in the RFP. A determination must be made by the SFA as to whether the proposal is responsive to the requirements of the solicitation and whether or not they are responsible and capable of furnishing the goods and services solicited. Contractor integrity, compliance with public policy, record of past performance and financial and technical resources are valid factors in determining contractor responsibility. SFAs must not change or by-pass the published evaluation and scoring criteria in order to circumvent full and

open competition.

Examples of evaluation and scoring criteria may include, however, is not limited to:

| | |
|---|---|
| (_____) points/% | Price/Cost (total cost of proposal submitted) MUST BE PRIMARY CONSIDERATION |
| (_____) points/% | Management Plan (demonstrates FSMC's plan and personnel for how services identified in the RFP are proposed) |
| (____) points/% | Experience of FSMC, reference letters, etc. (includes total business experience as well as with LEAs of similar size operating Child Nutrition Programs including references of these LEAs) |
| (_____) points/% | Financial Condition/Stability, Business Practices |
| (_____) points/% | Accounting and Reporting Systems |
| (_____) points/% | Personnel Management and Professional Standards Plan |
| (_____) points/% | Procurement-specifically the Quality of the Food to be Purchased |
| (_____) points/% | Promotion/Marketing in School Food Service |
| (_____) points/% | Involvement of Students, Staff, and Patrons |
| (_____) points/% | other criteria as specified |

100 points/% TOTAL

**Sealed Bid Versus Competitive Proposals**

While SFAs may establish the priority for the points/percentage used in the evaluation criteria and scoring for determination of contract award, 2 CFR 200.320(c)(2)(iv) requires that when solicitations use sealed bidding, fixed-price contracts must be awarded principally on the basis of price to the **lowest, responsive, and responsible bidder**. For solicitations using a request for proposal, when either a fixed-price or cost-reimbursable contract is awarded, the evaluation and scoring criteria used must result in a contract award that is **most advantageous to the program, with price and other factors considered** [2 CFR 200.320(d)(4)]. While price is not the sole basis for contract award, price remains the primary consideration once the most qualified proposals are identified.

Negotiations are conducted with offerors whose proposals receive evaluation scores that exceed a numerical value (i.e., cut-off score) established in advance by the evaluation panel. This "cut-off" score is determined prior to opening any of the proposals. After the evaluations have been completed and all proposals are ranked, those proposals that meet or exceed the pre-established cut-off score are forwarded to the individual or team responsible for negotiating with the offerors. As with IFB bid openings, the name of each offeror and the evaluation score must be recorded. Offerors not selected for further negotiation should be notified in writing.

Contract negotiations must be conducted in a fair and equitable manner. As with all aspects of procurement, the negotiators must be well prepared. The individual(s) evaluating the proposals should not be the same individuals who conduct negotiations with offerors whose proposals receive scores above the prescribed cut-off. The negotiators should inform all offerors of the terms and conditions of the negotiation, including which elements will not be negotiable and which elements can be negotiated. If at all possible, the negotiators should be experienced in school food service operations, school finance and contract negotiations.

It is expected that the negotiation process will result in the selection of the successful offeror. However, if after negotiations, two or more offerors are still under consideration, the SFA must make a final selection, using an unbiased method, e.g., the bidders are asked to submit a best and final price. The offerors should be informed of the situation and the method the SFA will use to select the successful offeror. The award should be made to the responsible offeror whose proposal is most advantageous to the SFA, price and other factors considered, with price the primary factor.

The SFA should provide written notification to the successful offeror which clearly states that while the offeror has been successful, the proposed contract is subject to review by the SA. This notice should also inform the successful offeror that if non-substantive changes are needed as a result of the SA review, an opportunity will be provided to amend the proposal.

When the SFA requests noncompetitive negotiation, mandatory FNS pre- award reviews should be in effect. Mandatory FNS pre-award review should also be in place when the SFA submits a request to limit the area of competition for good cause, or the procurement is deemed sole source.

If board approval of the contract is required, this requirement should also be included in the letter to the successful offeror. Unsuccessful offerors should be notified promptly.

The two other methods of procurement—Small Purchase (for purchases below the Simplified Acquisition Threshold) and Noncompetitive Negotiation—are limited to specific situations as outlined in 2 CFR 200.320(f).

### Analysis of Price

The contract documents should clearly indicate factors to be considered in determining the price. Whether an IFB or RFP, the following factors must be considered:

**Prompt Payment Discounts**—a prompt payment discount is an applicable credit to the nonprofit food service account only if the SFA earns the reduction by paying the bill or by providing advance funds to another party to pay the bill on its behalf. In the majority of school food authority cost reimbursable contracts, distributors and food service management companies obtain goods from suppliers, are billed by those suppliers, pay the suppliers and then deliver the goods at some later point in time to the SFA. In these arrangements, the prompt payment discounts are not applicable credits to the SFA and may be kept by the FSMC.

**Volume Discounts/Financial Incentives**—allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority [210.21(f)(1)(i)].

**Other Benefits**—goods, services, or other benefits that do not accrue to the nonprofit school food service account cannot be used to determine the price submitted.

**Total Cost**—the total cost of the bid/proposal for the breakfast, lunch, a la carte meal service and any other child nutrition program meal service such as the Summer Food Service Program or the Child and Adult Care Food Program that is operated by the SFA and included in the bid/proposal request, must be used in determining the lowest bid/proposal.

**21-Day Cycle Menu**—if the SFA determines, and the State Agency agrees, that the SFA is unable to develop a cycle menu, the State Agency may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the original solicitation. The solicitation should identify the criteria that the SFA will use to evaluate the FSMC's menu, such as meal pattern requirements, components, quantities required in the meal pattern, dietary specifications, affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.
Please note that the FSMC-developed cycle menus are only appropriate to use under the competitive proposal method of procurement, since under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

# Chapter 6: State Agency Review

## Timing

Under 7 CFR 210.16(a)(10), the SFA must ensure that the State Agency has reviewed and approved the contract terms (including all procurement documents)between an SFA and FSMC prior to execution of the contract to ensure compliance with all the provisions and standards set forth in that part and also in Part 250, Subpart D. The State agency may establish due dates for the submission of the contract or contract renewal documents. The State Agency is advised to consult with the State distributing agency if different from the State Agency with respect to contract requirements relating to donated foods.

## Contract Checklist

A checklist should be completed by the SFA and submitted with documents to be reviewed by the State Agency. In the case of renewals, the SFA is encouraged to submit with the renewal documents a copy of the checklist submitted with the initial contract, with notations where changes have occurred and an indication of the basis for the renewal.

## Response to State Agency Comments

For sealed bid procurement, the State Agency's comments on the prototype contract can be easily accommodated. In the case of negotiated contracts, the situation may be more complex. If the State Agency reviewed the non–negotiable provisions of the contract prior to release of the RFP, the State Agency's comments can be incorporated prior to issuing the RFP. After negotiations are completed, the negotiated provisions of the proposed contract should be reviewed by the State Agency. These provisions may require revision before the contract is final. This can create situations where the offeror withdraws or modifies a final offer. In these cases, the SFA may need to reopen negotiations. In cases where the State Agency did not review the non–negotiable provisions of the contract, the entire contract should be reviewed and could be open for revision.

In either case, any revisions required by the State Agency in a negotiated contract must be accepted by the successful offeror before the contract can be finalized. If the revisions significantly alter the scope of work under the contract, re-negotiations may be necessary. After the State Agency reviews the negotiated contract and any revisions have been made, the contract can be signed by the SFA and the FSMC. For both sealed bid and negotiated contracts, a copy of the signed contract must be submitted to the State Agency.

For more information on State Agency review, see the *FSMC Guidance for State Agencies*.

# Chapter 7: SFA Monitoring and Recordkeeping Responsibilities

## Monitoring

One of the general procurement standards in 2 CFR 200.318(b) includes maintaining oversight of contractors to ensure contractors perform in accordance with the terms, conditions, and specifications of their contracts and purchase orders. To ensure that the FSMC performs the contracted services in accordance with the contract, the SFA must monitor the operation of the FSMC. Contract administration of a FMSC contract is more than just a periodic on-site visit in order to ensure that the FSMC complies with the contract and any other applicable Federal, State, and local rules and regulations. The SFA must monitor the billing invoices to ensure the number of meals served is reported correctly, the value of USDA Foods received is credited to the SFA for both "brown box" foods and processed end-products, and that USDA Foods are used in meals served. For SFAs with cost-reimbursable type contracts, the SFA must also ensure the value of discounts, rebates, and credits received by the FSMC are reported and credited to the SFA nonprofit food service account. Ensuring these credits are reported and received by the nonprofit food service account may entail obtaining a copy of the vendor invoice and conducting an audit of the vendor price paid for the product. Chapter 3 addresses this in the Financial section.

The SFA must maintain documentation of its monitoring and crediting of the value of USDA Foods for both fixed-price and cost-reimbursable type contracts and the value of discounts, rebates, and credits for commercially purchased foods and supplies for cost-reimbursable type contracts. The SFA must also document actions taken when findings of noncompliance with the contract are identified. The SFA's contract monitoring responsibilities include, but are not limited to, evaluating:

**Cycle Menu**—adherence to the cycle menu and any and all deviations allowed under the contract.

**Meal Pattern**—adherence to the meal pattern requirements specified in 7 CFR 210 and/or 220 and regulations for all programs operated.

**Claim Documentation**—records, by school, to support the Claim for Reimbursement (meal/milk counts and any other data on the claim for which the FSMC is responsible).

**Cost Records**—cost records, including source documentation supporting charges for contractually approved costs for cost–based contracts, e.g., time and attendance records for staff hours charged.

**Meal Count Records**—meal count records for meals not covered by the Claim for Reimbursement, e.g., adult meals.

**Revenue Records**—revenue records broken down by source, type and category of meal or food service, e.g., a la carte sales, reduced price and full price NSLP and SBP meals, vending machine sales, etc.

**Outside Activities & Preparation Facilities**—outside food service activities and FSMC

meal preparation facilities

**USDA Foods**—that they have conducted a reconciliation at least annually (and upon termination of the contract) to ensure that the FSMC has credited it for the value of all USDA Foods received for use in the SFA's food service in the school year, including, in accordance with requirements in 7 CFR 250.51(a), the value of USDA Foods contained in processed end products.

Please Note: If the FSMC is in charge of the meal counting and claiming system, refer to the regulations at 210.8(a)(1) which state that every school year an SFA with more than one school must perform at least one on-site review of the lunch counting and claiming system employed by each school under its jurisdiction. Therefore, if the FSMC is, in fact, in charge of the meal counting and claiming system, the SFA would be monitoring that portion of their services every school year.

### Additional Monitoring Responsibilities

The SFA must conduct on-site school reviews and must monitor through these reviews and by other means:

**Civil Rights**—compliance with civil rights requirements. In addition to monitoring compliance, the SFA must ensure the FSMC complies with the procedures established by the SFA for referring any civil rights complaints to the SFA.

**Free and Reduced Price Policy**—adherence to the SFA's approved free and reduced price meal policy statement.

**Offer versus Serve**—compliance with offer versus serve requirements.

**Competitive Foods**—compliance with the Smart Snacks requirements of the NSLP regulations in all schools by all parties. Reporting of non-program food and meal expenditures and revenue and the proportion of costs to revenues must also be reported by SFAs. If the FSMC is to report this information on behalf of the SFA, this must be specified in the original solicitation and contract.

**SFA Policies**—compliance with all policies established by the SFA.

## Recordkeeping Responsibilities

As discussed in Chapter 3, the SFA must maintain any books, papers and records directly pertinent to: the solicitation, award or extension of any given contract and the implementation of that contract. Such records must be maintained for a period of 3 years, as specified in 7 CFR 210.23(c).

Additionally, the SFA must ensure that the contract/solicitation for the FSMC includes a provision outlining the recordkeeping responsibilities. A sample monitoring form is provided in Appendix G, which SFAs may use or adapt for use when monitoring FSMCs.

# Chapter 8: Contract Duration/Renewals

## Duration

As stated earlier, the contract duration must be limited to one year, with the effective beginning and ending dates stated in the contract. The beginning date is not prior to approval by the State agency and should not be prior to the date the contract is signed by all authorized parties. Additionally, if renewals will be permitted, the contract must also state the date by which the renewal must be approved by the State agency and executed by both the SFA and FSMC.

Although a maximum of four one–year renewals are permitted, contracts cannot contain automatic renewal provisions. The renewal date must occur on or prior to the expiration date of the current contract. Any provisions, including adjustments to payments, which will be used for renewing a contract, must be stated in that contract and in the original IFB or RFP, as applicable. These alterations cannot result in substantive changes to the original solicitation and contract. If the SFA determines that significant changes that are material in nature are necessary, then the SFA must rebid the contract.

Please note that contracts (including all supporting documentation) between any SFA and FSMC must be reviewed annually by the State agency prior to execution of the contract by either party to ensure compliance with all the provisions and standards set forth in this part.

## Renewals/Amendments

While contract renewals are permitted, an SFA is not required to renew the contract for an additional year and should do so only after careful evaluation of the FSMC's performance, ensuring the return of all discounts, rebates, and credits, and upon determination that the renewal will benefit the SFA.

In the case of a contract amendment, SFA must ensure that any changes to the contract do not result in a material change to the terms and conditions of the original contract. Furthermore, FSMCs may not develop such changes. A material change is any change made to a contract after it has been awarded that alters the terms and conditions of that contract substantially enough that had other respondents known of these changes in advance, they could have bid differently and more competitively. This means that when a school food authority agrees to or allows a winning bidder to make changes to contract terms (including the terms of a contract renewal) that are materially inconsistent with the underlying solicitation document, the school food authority has subverted full and open competition by denying all bidders the opportunity to compete under the same terms and conditions. In this situation, the SFA must re- bid the contract.

Again, contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms as long as scope and contract modification do not create a material change. Any methods, frequency and basis for fee adjustment upon renewal must be addressed in the original solicitation and contract. The basis must be specified on a standard index, such as the Consumer Price Index for All Urban Consumers.

The SFA's contract with the FSMC must include all of the provisions listed in 7 CFR 250.53, as applicable. In accordance with 7 CFR 250.52(c), when a contract terminates, and is not extended or

renewed, the FSMC must return all unused donated ground beef, donated ground pork, and processed end products, and must, at the SFA's discretion, return other unused donated foods. The SFA must also ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's food service in the school year.

Some elements that should be used when deciding whether to renew a contract are:

**Performance**—the overall performance of the FSMC in accordance with the contract provisions, including the FSMC's completion of planned activities as described in the contract. The SFA should document its findings while conducting its monitoring requirements of the FSMC and refer to these documents when making this determination. In addition to reviewing the deficiencies noted in the FSMC's performance, the SFA should review the effectiveness of the FSMC's corrective action plans.

**Meal Quality**—adherence to menu cycle/food specifications, and complaints.

**Costs**—the full cost of using an FSMC versus the projected costs under the contract.

**Financial Status**—the overall financial status of the food service operation and the food service account.

**Unexpected Costs**—any unexpected costs incurred as a result of using an FSMC, and any unexpected cost reductions that have resulted from using an FSMC. The SFA should ascertain these costs based on information received from the FSMC and other sources.

**Participation**—participation trends including NSLP/SBP participation compared to a la carte sales.

**Advisory Board**—the comments and recommendations of the advisory board and the FSMC's responsiveness to these recommendations.

**Adjustments to Payments**—any increase in the prices requested by the FSMC or any change in the basis upon which the FSMC is paid. Price adjustments must be made only as specified in the original solicitation and contract.

**Crediting for the Value of USDA Foods**—assurance of crediting for the value of all USDA Foods received for use in the SFA's meal service in the school year, in accordance with 7 CFR 250.51(a) and (b).

**Corrective Actions**—recommendations from local, State, and Federal reviews and audits, including the status of required corrective actions.

# Appendix A: Program Regulations

**Food Service Management Company contracts. 7 CFR 210.16**
Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(a)(1) Adhere to the procurement standards specified in §210.21 when contracting with the food service management company;

(2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(3) Monitor the food service operation through periodic on-site visits;

(4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(5) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;

(6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;

(7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility;

(8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning;

(9) Obtain written approval of invitations for bids and requests for proposals before their issuance when required by the State agency. The school food authority must incorporate all State agency required changes to its solicitation documents before issuing those documents; and

(10) Ensure that the State agency has reviewed and approved the contract terms and that the school food authority has incorporated all State agency required changes into the contract or amendment before any contract or amendment to an existing food service management company contract is executed. Any changes made by the school food authority or a food service management company to a State agency pre-approved prototype contract or State agency approved contract term must be approved in writing by the State agency before the contract is executed. When requested, the school food authority must submit all procurement documents, including responses submitted by potential contractors, to the State agency, by the due date established by the State agency.

(c)(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in

accordance with §210.23(c).

(2) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain this health certification for the duration of the contract.

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in §210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(d) Duration of contract. The contract between a school food authority and food service management company shall be of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

**Procurement Standards. 7 CFR 210.21**

**(d) Buy American**—(1) Definition of domestic commodity or product. In this paragraph (d), the term 'domestic commodity or product' means—

(i) An agricultural commodity that is produced in the United States; and

(ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(2) Requirement. (i) In general. Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products.

(ii) Limitations. Paragraph (d)(2)(i) of this section shall apply only to—

(A) A school food authority located in the contiguous United States; and

(B) A purchase of domestic commodity or product for the school lunch program under this part.

(f) **Cost reimbursable contracts—(1) Required provisions.** The school food authority must include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts:

(i) Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;

(ii)(A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food

service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account); or

(B) The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

(iii) The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;

(iv) The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;

(v) The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and

(vi) The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

(2) Prohibited expenditures. No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

(g) **Geographic preference.** (1) A school food authority participating in the Program, as well as State agencies making purchases on behalf of such school food authorities, may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products. When utilizing the geographic preference to procure such products, the school food authority making the purchase or the State agency making purchases on behalf of such school food authorities have the discretion to determine the local area to which the geographic preference option will be applied;

(2) For the purpose of applying the optional geographic procurement preference in paragraph (g)(1) of this section, "unprocessed locally grown or locally raised agricultural products" means only those agricultural products that retain their inherent character. The effects of the following food handling and preservation techniques shall not be considered as changing an agricultural product into a product of a different kind or character: Cooling; refrigerating; freezing; size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; forming ground products into patties without any additives or fillers; drying/dehydration; washing; packaging (such as placing eggs in cartons), vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package); the addition of ascorbic acid or other

preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning fish; and the pasteurization of milk.

**7 CFR 250.50 Subpart D—Donated Foods in Contracts With Food Service Management Companies**

**Contract requirements and procurement. 7 CFR 250.50**

(a) Contract requirements. Prior to donated foods being made available to a food service management company, the recipient agency must enter into a contract with the food service management company. The contract must ensure that all donated foods received for use by the recipient agency for a period specified as either the school year or fiscal year are used in the recipient agency's food service. Contracts between recipient agencies in child nutrition programs and food service management companies must also ensure compliance with other requirements in this subpart relating to donated foods, as well as other Federal requirements in 7 CFR 210, 220, 225, or 226, as applicable. Contracts between other recipient agencies—i.e., charitable institutions and recipient agencies utilizing TEFAP foods—and food service management companies are not subject to the other requirements in this subpart.

(b) Types of contracts. Recipient agencies may enter into a fixed-price or a cost-reimbursable contract with a food service management company, except that recipient agencies in CACFP are prohibited from entering into cost-reimbursable contracts, in accordance with 7 CFR 226. Under a fixed-price contract, the recipient agency pays a fixed cost per meal provided or a fixed cost for a certain time period. Under a cost-reimbursable contract, the food service management company charges the recipient agency for food service operating costs, and also charges fixed fees for management or services.

(c) Procurement requirements. The recipient agency must meet Departmental procurement requirements (*formerly in* 7 CFR 3016 or 3019) (*now in 2 CFR 200.317-326*), (as applicable, in obtaining the services of a food service management company, as well as applicable requirements in 7 CFR 210, 220, 225, or 226. The recipient agency must ensure that procurement documents, as well as contract provisions, include any donated food activities that a food service management company is to perform, such as those activities listed in paragraph (d) of this section. The procurement and contract must also specify the method used to determine the donated food values to be used in crediting, or the actual values assigned, in accordance with §250.51. The method used to determine the donated food values may not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the procurement or contract.

(d) Activities relating to donated foods. A food service management company may perform specific activities relating to donated foods, such as those listed in this paragraph (d), in accordance with procurement documents and its contract with the recipient agency. Such activities may also include the procurement of processed end products on behalf of the recipient agency. Such procurement must ensure compliance with the requirements in subpart C of this part and with the provisions of the distributing or recipient agency's processing agreements, and must ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value. Although the food service management company may procure processed end products on behalf of the recipient agency, it may not itself enter into the processing agreement with the processor required in subpart C of this part. Other donated food activities that the food service

management company may perform include:

(1) Preparing and serving meals;

(2) Ordering or selection of donated foods, in coordination with the recipient agency, and in accordance with §250.58(a);

(3) Storage and inventory management of donated foods, in accordance with §250.52; and

(4) Payment of processing fees or submittal of refund requests to a processor on behalf of the recipient agency, or remittance of refunds for the value of donated foods in processed end products to the recipient agency, in accordance with the requirements in subpart C of this part.

**Crediting for, and use of, donated foods. 7 CFR 250.51**

(a) Crediting for donated foods. In both fixed-price and cost-reimbursable contracts, the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year (including both entitlement and bonus foods). Such requirement includes crediting for the value of donated foods contained in processed end products if the food service management company's contract requires it to:

(1) Procure processed end products on behalf of the recipient agency; or

(2) Act as an intermediary in passing the donated food value in processed end products on to the recipient agency.

(b) Method and frequency of crediting. The recipient agency may permit crediting for the value of donated foods through invoice reductions, refunds, discounts, or other means. However, all forms of crediting must provide clear documentation of the value received from the donated foods—e.g., by separate line item entries on invoices. If provided for in a fixed-price contract, the recipient agency may permit a food service management company to pre-credit for donated foods. In pre-crediting, a deduction for the value of donated foods is included in the established fixed price per meal. However, the recipient agency must ensure that the food service management company provides an additional credit for any donated foods not accounted for in the fixed price per meal—e.g., for donated foods that are not made available until later in the year. In cost-reimbursable contracts, crediting may be performed by disclosure; i.e., the food service management company credits the recipient agency for the value of donated foods by disclosing, in its billing for food costs submitted to the recipient agency, the savings resulting from the receipt of donated foods for the billing period. In all cases, the recipient agency must require crediting to be performed not less frequently than annually, and must ensure that the specified method of valuation of donated foods permits crediting to be achieved in the required time period. A school food authority must also ensure that the method, and timing, of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

(c) Donated food values required in crediting. The recipient agency must ensure that, in crediting it for the value of donated foods, the food service management company uses the donated food values determined by the distributing agency, in accordance with §250.58(e), or, if approved by the

distributing agency, donated food values determined by an alternate means of the recipient agency's choosing. For example, the recipient agency may, with the approval of the distributing agency, specify that the value will be the average price per pound for a food, or for a group or category of foods (e.g., all frozen foods or cereal products), as listed in market journals over a specified period of time. However, the method of determining the donated food values to be used in crediting must be included in procurement documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted. Additionally, the method of valuation must ensure that crediting may be achieved in accordance with paragraph (b) of this section, and at the specific frequency established in procurement documents and in the contract.

(d) Use of donated foods. The food service management company must use all donated ground beef, donated ground pork, and all processed end products, in the recipient agency's food service, and must use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service (unless the contract specifically stipulates that the donated foods, and not such commercial substitutes, be used).

**Storage and inventory management of donated foods. 7 CFR 250.52**

(a) General requirements. The food service management company must meet the general requirements in §250.14(b) for the storage and inventory management of donated foods.

(b) Storage and inventory with commercially purchased foods. The food service management company may store and inventory donated foods together with foods it has purchased commercially for the school food authority's use (unless specifically prohibited in the contract). It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of donated foods in §250.51(d)—i.e., use all donated ground beef and ground pork, and all end products in the food service, and use all other donated foods or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the food service. Additionally, under cost-reimbursable contracts, the food service management company must ensure that its system of inventory management does not result in the recipient agency being charged for donated foods.

(c) Disposition of donated foods and credit reconciliation upon termination of the contract. When a contract terminates, and is not extended or renewed, the food service management company must return all unused donated ground beef, donated ground pork, and processed end products, and must, at the recipient agency's discretion, return other unused donated foods. The recipient agency must ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year, as applicable.

**USDA Foods Required Contract Provisions 7 CFR 250.53**

(a) Required contract provisions in fixed-price contracts. The following provisions relating to the use of donated foods must be included, as applicable, in a recipient agency's fixed-price contract with a food service management company. Such provisions must also be included in procurement

documents. The required provisions are:

(1) A statement that the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in the school year or fiscal year (including both entitlement and bonus foods), and including the value of donated foods contained in processed end products, in accordance with the contingencies in §250.51(a);

(2) The method and frequency by which crediting will occur, and the means of documentation to be utilized to verify that the value of all donated foods has been credited;

(3) The method of determining the donated food values to be used in crediting, in accordance with §250.51(c), or the actual donated food values;

(4) Any activities relating to donated foods that the food service management company will be responsible for, in accordance with §250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR 250;

(5) A statement that the food service management company will use all donated ground beef and ground pork products, and all processed end products, in the recipient agency's food service;

(6) A statement that the food service management company will use all other donated foods, or will use commercially purchased foods of the same generic identity, of U.S. origin, and of equal of better quality than the donated foods, in the recipient agency's food service;

(7) Assurance that the procurement of processed end products on behalf of the recipient agency, as applicable, will ensure compliance with the requirements in subpart C of 7 CFR 250 and with the provisions of distributing or recipient agency processing agreements, and will ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value;

(8) Assurance that the food service management company will not itself enter into the processing agreement with the processor required in subpart C of 7 CFR 250;

(9) Assurance that the food service management company will comply with the storage and inventory requirements for donated foods;

(10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the food service management company's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods;

(11) A statement that the food service management company will maintain records to document its compliance with requirements relating to donated foods, in accordance with §250.54(b); and

(12) A statement that extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to donated foods.

(b) Required contract provisions in cost-reimbursable contracts**.** A cost-reimbursable contract must include the same provisions as those required for a fixed-price contract in paragraph (a) of this section. Such provisions must also be included in procurement documents. However, a cost-reimbursable contract must also contain a statement that the food service management company will ensure that its system of inventory management will not result in the recipient agency being charged for donated foods.

**2 CFR 200.318-326**

**Recommended language:**

**2 CFR 200.318(c)(1)** A provision to reference **standards of conduct** that prohibit real or apparent conflict of interest and disciplinary actions to be applied for violations of such standards.

**2 CFR 200.319**

(a) All procurement transactions must be conducted in a manner providing **full and open competition** consistent with the standards of this section. In order to ensure **objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.**

**Prohibited restrictions to competition:**

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;
(2) Requiring unnecessary experience and excessive bonding;
(3) Noncompetitive pricing practices between firms or between affiliated companies;
(4) Noncompetitive contracts to consultants that are on retainer contracts;
(5) Organizational conflicts of interest;
(6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
(7) Any arbitrary action in the procurement process.

**Prohibited language of State requirements on geographic preference**:

(b) … conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals,…"

**Required:**

**2 CFR 200.320(c)(2)(iv)** "A firm fixed-price contract award will be in writing to **the lowest responsive and responsible bidder.**"

**2 CFR 200.320(d)(4)** "Contracts must be awarded to the responsible firm whose proposal is **most advantageous to the program, with price and other factors considered;…"**

**2 CFR 200.323(d)** "**The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.**"

**2 CFR 200.324(b)** The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to **exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received** in response to a solicitation;

(3) The procurement, which is expected to **exceed the Simplified Acquisition Threshold, specifies a "brand name" product;**

(4) The proposed contract is **more than the Simplified Acquisition Threshold** and is to be awarded to **other than the apparent low bidder** under a sealed bid procurement; or

(5) A proposed **contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold**.

**Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards**

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) **Contracts for more than the simplified acquisition threshold currently set at $150,000**, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in **excess of $10,000** must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) **Equal Employment Opportunity**. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(D) **Davis-Bacon Act**, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in **excess of $2,000** awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) **Contract Work Hours and Safety Standards Act** (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in **excess of $100,000** that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) **Rights to Inventions Made Under a Contract or Agreement.** If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(G) **Clean Air Act** (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33

U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in **excess of $150,000** must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) **Debarment and Suspension** (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) **Byrd Anti-Lobbying Amendment** (31 U.S.C. 1352)—Contractors that apply or bid for an award **exceeding $100,000** must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

**Required:**
**Civil Rights Assurances [ref. FNS 113-1 Section X; Child Nutrition Programs Appendix B (D)] and Nondiscrimination Statement**

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, sex, religious creed, disability, age, political beliefs, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA.

Persons with disabilities who require alternative means of communication for program information (e.g. Braille, large print, audiotape, American Sign Language, etc.), should contact the Agency (State or local) where they applied for benefits. Individuals who are deaf, hard of hearing or have speech disabilities may contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program complaint of discrimination, complete the USDA Program Discrimination Complaint Form, (AD-3027) found online at: http://www.ascr.usda.gov/complaint_filing_cust.html, and at any USDA office, or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

(1) mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9410;

(2) fax: (202) 690-7442; or

(3) email: program.intake@usda.gov.

This institution is an equal opportunity provider.

## Appendix B: Policy Guidance on Procurement Topics

• SP 24-2016 Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program, dated February 3, 2016;
http://www.fns.usda.gov/sites/default/files/cn/SP24-2016os.pdf

• SP 12-2016, CACFP 05-2016, SFSP 09-2016, Guidance on Competitive Procurement Standards for Program Operators, dated November 13, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP12_CACFP05_SFSP09-2016os.pdf

• SP 07-2016, SFSP 07-2016, Local Foods and Related Activities in Summer Meal Programs, with Questions and Answer, dated November 12, 2015;
http://www.fns.usda.gov/sites/default/files/SP07_SFSP07-2016os.pdf

• SP 04-2016, CACFP 04-2016, SFSP 04-2016, Local Agency Procurement Reviews School Year 2015-2016, dated November 9, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP04_CACFP04_SFSP04-2016os.pdf

• SP 03-2016, CACFP 03-2016, SFSP03-2016, Procurement Standards and Resource Management Requirements related to Franchise Agreements, dated November 6, 2015;
http://www.fns.usda.gov/sites/default/files/SP03_CACFP03_SFSP03-2016os.pdf

• SP02-2016, CACFP 02-2016, SFSP 02-2016, Questions and Answers on the Transition to and Implementation of 2 CFR Part 200, dated October 30, 2015;
http://www.fns.usda.gov/sites/default/files/SP02_CACFP02_SFSP02-2016os.pdf

• SP 01-2016, CACFP 01-2016, SFSP 01-2016, Procuring Local Meat, Poultry, Game, and Eggs for Child Nutrition Programs, dated October 22, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP01_CACFP%2001_SFSP01-2016os.pdfhttp://www.fns.usda.gov/sites/default/files/cn/SP01_CACFP%2001_SFSP01-2016os.pdf

• SP 11-2015(v2) CACFP 10-2015 SFSP 13-2015, CN Labels Copied with a Watermark Acceptable Documentation, dated, March 11, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP11v2_CACFP10_SFSP13-2015os.pdf

• SP 30-2015, SFSP 18-2015, CACFP 16-2015, Office of Management and Budget Super-Circular - 2 CFR Part 200, dated March 18, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP30_CACFP16_SFSP18-2015os.pdf
• CACFP 11-2015, Local Foods in the Child and Adult Care Food Program, dated March 13, 2015;
http://www.fns.usda.gov/local-foods-child-and-adult-care-food-program

• SP 11-2015(v2) CACFP 10-2015 SFSP 13-2015, CN Labels Copied with a Watermark Acceptable Documentation, dated March 11, 2015;
http://www.fns.usda.gov/sites/default/files/cn/SP11v2_CACFP10_SFSP13-2015os.pdf

• SP 09-2015, CACFP 03-2015, SFSP 02-2015, Written Codes of Conduct and Performance of Employees Engaged in Award and Administration of Contract, dated November 21, 2014; http://www.fns.usda.gov/sites/default/files/cn/SP09_CACFP%2003_SFSP02-2015os.pdf

• SP 06-2015, Farm to School and School Garden Expenses, dated November 12, 2014 http://www.fns.usda.gov/farm-school-and-school-garden-expenses

• SP 01-2013 CACFP 01-2013 SFSP 01-2013, Federal Small Purchase Threshold Adjustment, dated October 2, 2012 and attachment; http://www.fns.usda.gov/sites/default/files/SP01_CACFP01_SFSP01-2013os.pdf http://www.fns.usda.gov/sites/default/files/SP01-2013a.pdf (attachment)

• SP 23-2013, Guidance Reaffirming the Requirement that State agencies and School Food Authorities Periodically Review Food Service Management Company Cost Reimbursable Contracts and Contracts Associated with USDA Foods, dated February 12, 2013; http://www.fns.usda.gov/sites/default/files/SP23-2013os.pdf

• SP 03-2013, CACFP 02-2013, SFSP 02-2013, Procurement Geographic Preference Q&As – Part II, dated October 9, 2012; http://www.fns.usda.gov/sites/default/files/SP03_CACFP02_SFSP02-2013os.pdf

• SP 01-2013 CACFP 01-2013 SFSP 01-2013, Federal Small Purchase Threshold Adjustment, dated October 2, 2012; http://www.fns.usda.gov/sites/default/files/SP01_CACFP01_SFSP01-2013os.pdf

• SP35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, dated June 12, 2012; http://www.fns.usda.gov/sites/default/files/SP35-2012os%20.pdf

• SP 19-2012, Soliciting Bids from Commercial Distributors for End Product, dated February 24, 2012 and attachment; http://www.fns.usda.gov/sites/default/files/SP19-2012os.pdf http://www.fns.usda.gov/sites/default/files/SP19-2012_FD119.pdf (attachment)

• SP 17-2012, Procurement Questions and Answers to Assist in the Implementation of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Programs, dated February 23, 2012; http://www.fns.usda.gov/sites/default/files/SP17-2012os.pdf

• SP 14-2012, Procurement Questions Relevant to the Buy American Provision, February 13, 2012; http://www.fns.usda.gov/sites/default/files/SP14-2012os.pdf

• SP 41 – 2011, Child Nutrition Reauthorization 2010: Indirect Cost Guidance, dated July 7, 2011 and attachment; http://www.fns.usda.gov/sites/default/files/SP41-2011_os.pdf http://www.fns.usda.gov/sites/default/files/SP41-2011a.pdf (attachment)

• SP_18 – 2011, Procurement Geographic Preference Q&As, dated February 1, 2011; http://www.fns.usda.gov/sites/default/files/SP18-2011_os.pdf

• SP 08-2010, CACFP 05-2010 SFSP 06-2010, Geographic Preference for the Procurement of Unprocessed Agricultural Products in the Child Nutrition Programs, dated November 13, 2009; http://www.fns.usda.gov/sites/default/files/SP_08_CACFP_05_SFSP_06-2010_os.pdf

• SP 01-2010, CACFP 01-2010 SFSP 01-2010, Applying Geographic Preferences in Procurements for the Child Nutrition Programs – Updates, dated October 9, 2009; http://www.fns.usda.gov/sites/default/files/SP_01-2010_os.pdf

• SP 28-2009, Procurement Questions, dated July 22, 2009; http://www.fns.usda.gov/sites/default/files/SP_28-2009_os.pdf

• SP 10-2009, Economic Price Adjustments in Vendor Contracts, dated January 23, 2009; http://www.fns.usda.gov/sites/default/files/SP_10-2009_os.pdf

• SP 09-2009, Competitive Procurement and Private Grants for School Food Programs, dated January 15, 2009; http://www.fns.usda.gov/sites/default/files/SP_09-2009_os.pdf

• SP 07-2009, Reminder: Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, dated January 9, 2009; http://www.fns.usda.gov/sites/default/files/SP_07-2009_os.pdf

• SP 30-2008, Applying Geographic Preferences in Procurements for the Child Nutrition Programs, dated July 9, 2008; http://www.fns.usda.gov/sites/default/files/SP_30-2008.pdf

• SP 21-2008, Prototype Language for Return of Discounts, Rebates and Credits to School Food Authorities, dated May 1, 2008; http://www.fns.usda.gov/sites/default/files/SP_21-2008.pdf

• SP 15-2008, Allowability of Procurement Fees in School Food Authority (SFA) Contract, dated March 12, 2008; http://www.fns.usda.gov/sites/default/files/SP_15-2008-OS.pdf

• SP 09-2008, Final Rule, Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, dated January 28, 2008; http://www.fns.usda.gov/sites/default/files/SP_09-2008-OS.pdf

• SP 02-2007, School Districts and Federal Procurement Regulations, dated January 23, 2007; http://www.fns.usda.gov/sites/default/files/SP_02-2007.pdf

• SP 29-2006, Buy American Reminder, August 9, 2006; http://www.fns.usda.gov/sites/default/files/SP_29-2006.pdf

• SP 19-2006, April 2006 Procurement Questions, dated April 25, 2006; http://www.fns.usda.gov/sites/default/files/SP_19-2006.pdf

• SP 20-2006, Procurement Questions Relevant to the Buy American Provision, dated April 17; 2006; http://www.fns.usda.gov/sites/default/files/SP_20-2006.pdf

**Food Distribution Memoranda**

• FD-023: National School Lunch Program (NSLP): Accounting for Donated Foods in Cost-Reimbursable Contracts Between School Food Authorities and Food Service Management Companies, dated February 25, 2004;
http://www.fns.usda.gov/sites/default/files/pmfd023_NSLP-FsmcContracts_0.pdf

• FD-040: State Processing, *Commodity Inventory Reduction at Further Processors*, dated January 12, 2005;
http://www.fns.usda.gov/sites/default/files/pmfd040_SP-FurtherProcessorsInventory.pdf

• FD-080: National School Lunch Program (NSLP), Summer Food Service Program (SFSP), and Child and Adult Care Food Program (CACFP) Guidance in Crediting for, and Use of, Donated Foods in Contracts with Food Service Management Companies, dated January 25, 2011;
http://www.fns.usda.gov/sites/default/files/pmfd080rev_NSLP-SFSP-CACFP_DonatedFoodswithFSMCsJan2011.pdf

• FD-110: National School Lunch Program (NSLP), Child and Adult Care Food Program (CACFP), and Summer Food Service Program (SFSP), Clarification in Crediting for, and Use of, Donated Foods in Contracts with Food Service Management Companies-First and Final Contract Years, dated January 25, 2011;
http://www.fns.usda.gov/sites/default/files/pmfd110_NSLP_CACFP_SFSP-CreditingDonatedFoodsrevJan2011.pdf

# Appendix C: Average Daily Participation Worksheet (NSLP and SBP)

| Site Name | Enrollment | Reimbursable Lunches | | | Paid Meal Price | | Reimbursable Breakfasts | | | Paid Meal Price | | Lunch Extra Sales | | Breakfast Extra Sales | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Paid | Free | Reduced | Student | Adult | Paid | Free | Reduced | Student | Adult | Student | Adult | Student | Adult |
| | | | | | | | | | | | | | | | |
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**Summer Food Service Program**
**(SFSP, if applicable)**

| Site Name | Enrollment | Reimbursable Lunch or Supper (L/S) | Reimbursable Breakfasts | Reimbursable Snack (am/pm) |
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| **TOTALS** | **0** | 0 | 0 | 0 |

# Appendix D: Labor Hours Worksheet

| EMPLOYEE NAME (if known or enter vacant) | JOB TITLE | HOURLY RATE ($) | DAILY HOURS | # OF DAYS PAID | TOTAL ANNUAL WAGE ($) | Employed by SFA/FSMC (enter SFA or FSMC) |
|---|---|---|---|---|---|---|
| | | | | | $ | |
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# Appendix E: Projected Operating Expenses Worksheet

| | TOTAL COST | COST/MEAL |
|---|---|---|
| **EXPENSES:** | | (Only if Fixed Price Contract) |
| **Food Cost-Including Commodities*** Enter the amounts of food and milk purchased and received. Include the Commodity Distribution Assessment Fee, Commodity Value and Bonus Commodity Value **(Do not include rebates, discounts and credits)** | $ - | $ - |
| **Commodity Delivery Charge*** Enter the charge to have the commodites delivered | $ - | $ - |
| **Direct Labor and Benefits*** Enter the gross amount paid for salaries and fringe benefits to foodservice workers | $ - | $ - |
| **Other Direct*** Enter the cost for nonfood items such as paper goods, supplies, equipment repairs | $ - | $ - |
| **Nonreimbursable Expenses*** Enter all expenditures that are not an allowable cost for reimbursement purposes | $ - | $ - |
| **Administrative Fee*** Enter the fee that will be charged to manage the program | $ - | $ - |
| **FSMC Management Fee*** Enter the fee that will be charged to manage the program | $ - | $ - |
| **Indirect Costs*** Enter the amount of utilities and indirect labor charged to manage the program | $ - | $ - |
| **Other: Please List* (catering, pre-packaged meals sold to outside schools)** | $ - | $ - |
| **Sub-total Expenses/Total Cost Per Meal** | $ - | $ - |
| **Less Rebates, Discounts and Applicable Credits** | **$ -** | |

| | | | |
|---|---|---|---|
| | | **SUMMARY** | |
| | | Total Revenue | $ - |
| **Guarantee to SFA*** | $ - | Total Expenses | $ - |
| **School Nutrition Program-Profit or (Loss)** | | | **$ -** |

***All items must be itemized in full detail on Budget Summary (Attachment 4b). Administrative Fee, Management Fee, and Guarantee to SFA must include the formula or methodology for calculation**

# Appendix F: Sample Instructions and Checklist for FSMC Contract Review

**Request for Proposal (RFP) - School Year _____**

**For SFA use only**

*This checklist is for use with the State agency RFP template.*

*Do not submit this checklist to the FSMC.*

Make sure you have entered your specific information in the proper areas of the RFP template. The grayed areas should be completed by the SFA prior to submitting the RFP for State agency approval. The RFP must be submitted to the State agency for approval at least two weeks before you plan to release the RFP and publish it for responses. Make sure you allow plenty of time to complete the advertising, review and award of your RFP in order to submit your proposed awarded contract to the State agency at least one month prior to the proposed start date of the contract. All contracts require approval prior to execution. [7 CFR 210.16]

**Specifications must contain the following:**

- ☐ Type of Procurement Method (Competitive Sealed Bid or Competitive Proposal)
- ☐ Date of the Pre-Bid Meeting (if applicable)
- ☐ Date and Time that bids will no longer be accepted
- ☐ Contact Information
- ☐ Completed Evaluation and Scoring Criteria for contract award
- ☐ Contract Terms (dates of contract)
- ☐ Additional Information (if applicable)
- ☐ Check the boxes beside all the programs that will operate with this contract
- ☐ SFA position responsible for verifying free and reduced household applications
- ☐ Required FSMC activities for purchasing and inventory of USDA Foods
- ☐ Crediting process for commodities
- ☐ SFA position responsible for monitoring inventory, storage and record retention requirements for USDA Foods
- ☐ Projected number of full feeding days

- ☐ Ownership of the Employees (employees retained by SFA or FSMC)
- ☐ SFA position responsible for monitoring the FSMC operations through on-site visits
- ☐ Party responsible for procuring goods and services under the proposed contract
- ☐ Insurance Requirements must be detailed - Comprehensive General Liability, Workman's Compensation, and Vehicle Insurance
- ☐ Proposed beginning and end dates for SFSP and/or SSO (if applicable)
- ☐ Addendums A-E (part of the RFP template)

**Forms**

- ☐ Attachment 1: Average Daily Participation (ADP) Worksheet NSLP and SBP, and SFSP, if applicable
- ☐ Attachment 2: Labor Hours Worksheet
- ☐ Attachment 3: Projected Operating Expenses Worksheet(s)

## Appendix G: Sample SFA-FSMC Monitoring Form

# SFA-FSMC Monitoring Form

Review Date: _____
Name of District and Site Monitored: _____

| Menus and Service | Yes | Needs Improvement | N/A |
|---|---|---|---|
| Has the FSMC followed the 21-day cycle menu, as described in contract, for the first 21 days of the contract? (Monitored during the first year of contract only) | ☐ | ☐ | ☐ |
| If changes were made to menus following the first 21 days of the contract, did the SFA approve them? | ☐ | ☐ | ☐ |
| Have all menu standards been maintained as to type and quality of meal service as outlined in the contract? | ☐ | ☐ | ☐ |
| Have all menus been developed using the agreed upon menu planning system(s)? | ☐ | ☐ | ☐ |
| Is the FSMC only serving reimbursable meals that comply with the latest USDA dietary guidelines as established by USDA in Federal regulations for the National School Lunch Program, the School Breakfast Program, and all other USDA contracted meal programs? | ☐ | ☐ | ☐ |
| Has the SFA hs retained control of the quality, extent, and general nature of its food service? | ☐ | ☐ | ☐ |
| Has the SFA made no payment to the FSMC for meals that are spoiled or unwholesome at time of delivery; or do not meet detailed specifications, or do not otherwise meet the requirements of the contract? | ☐ | ☐ | ☐ |
| Are production records completed each day for all meals claimed for reimbursement? | ☐ | ☐ | ☐ |
| Is the FSMC following regulations concerning not selling restricted foods of minimal nutritional value in the food service areas during meal service periods (e.g.,carbonated beverages, certain candies, water ices and chewing gum)? | ☐ | ☐ | ☐ |

| **Menus and Service** continued | Yes | Needs Improvement | N/A |
|---|---|---|---|
| Are meals monitored after the last food or menu item is served/selected to ensure that only reimbursable meals are claimed? | ☐ | ☐ | ☐ |
| Do the foods purchased meet the quality specification standards indicated in the contract? | ☐ | ☐ | ☐ |
| Does the SFA evaluate the FSMC's menus for affordability, nutrition requirements, and appeal to the students? | ☐ | ☐ | ☐ |
| **USDA Donated Foods** | Yes | Needs Improvement | N/A |
| Does the SFA received credit for the value of USDA-donated foods, received during the school year or fiscal year? | ☐ | ☐ | ☐ |
| Credit for the value of donated foods was received through (circle all that apply):<br><br>Invoice reductions<br><br>Refunds<br><br>Discounts<br><br>Other: | ☐ | ☐ | ☐ |
| Does the FSMC provided clear documentation of the value received and of credit being recognized? (This includes crediting for the value of donated foods contained in processed end products.) | ☐ | ☐ | ☐ |
| Does the USDA Foods billing statement detail the value of the USDA Foods received and that it was used as the value for all credits? | ☐ | ☐ | ☐ |
| Does the FSMC contract outline the frequency by which crediting will occur and was that followed? (Crediting is to be performed at least annually.) | ☐ | ☐ | ☐ |
| Does the SFA retain title to all USDA donated foods and ensure that all USDA donated foods are made available to the FSMC, including processed foods? | ☐ | ☐ | ☐ |
| Does the SFA/FSMC use USDA donated foods to the maximum extent in quantities that can be used and stored without waste? | ☐ | ☐ | ☐ |
| Does the FSMC use all donated foods, or commercially purchased foods of the same generic identity, of U.S. | ☐ | ☐ | ☐ |

| | | | |
|---|---|---|---|
| origin, and of equal or better quality than the donated foods in the SFA's food service? | | | |
| Deos the FSMC use all donated ground beef, ground pork, and all processed end products in the SFA's food service without substitution? | ☐ | ☐ | ☐ |
| For cost-reimbursable contracts, does the FSMC ensure that its system of inventory management do not result in the SFA being charged for donated foods? | ☐ | ☐ | ☐ |
| Is the FSMC responsible for receiving donated foods on behalf of the SFA?<br><br>If yes, is the SFA verifying delivery of donated food shipments and end products and not relying solely on the FSMC records? | ☐<br>☐ | ☐<br>☐ | ☐<br>☐ |
| **Financial Accountability Procedures** | **Yes** | **Needs Improvement** | **N/A** |
| Do the food service daily meal count records accurately reflect the counts of student and adult meals by meal type and eligibility category? | ☐ | ☐ | ☐ |
| The FSMC maintains records to support the Claims for Reimbursement,reports claim information to the SFA promptly at the end of each month, and has meal count records for meals not covered by the Claim e.g., adult meals. | ☐ | ☐ | ☐ |
| Do the food service daily income records accurately reflect the revenue received by meal type? (student meals, adult meals, a la carte, etc.) | ☐ | ☐ | ☐ |
| For FSMC Cost Reimbursement Contracts:<br><br>Has the SFA audited the food and non-food invoices to assure that bills sent reflect actual expenses? | ☐ | ☐ | ☐ |
| Has the SFA audited time reporting forms to assure only actual hours worked are billed to the SFA? | ☐ | ☐ | ☐ |
| Are allowable costs paid from the nonprofit school food service account net of all discounts, rebates, and other applicable credits accruing to or received by the FSMC? | ☐ | ☐ | ☐ |
| Is the FSMC transparent in their identification of all rebates, discounts, and applicable credits, and the FSMC provides sufficient information to permit the SFA to | ☐ | ☐ | ☐ |

| | | | |
|---|---|---|---|
| identify allowable and unallowable costs? | | | |
| Are all bills monitored to assure that the FSMC has not double-billed or included costs that are not allowed by the contract? | ☐ | ☐ | ☐ |

(Continued on next page.)

| **Sanitation and Safety Procedures** | **Yes** | **Needs Improvement** | **N/A** |
|---|---|---|---|
| Are facilities and equipment adequately maintained for safety and sanitation? | ☐ | ☐ | ☐ |
| Do employees practice safe food-handling procedures? | ☐ | ☐ | ☐ |
| Are State health licenses maintained as required by the contract? | ☐ | ☐ | ☐ |
| Does the SFA assure that all State and local regulations are being met by the FSMC? | ☐ | ☐ | ☐ |
| **Other Contractual Requirements** | **Yes** | **Needs Improvement** | **N/A** |
| Has the FSMC used the advisory committee of parents, students, and teachers to assist in menu planning? | ☐ | ☐ | ☐ |
| Have all corrections been made as required if problems were noted during an SFA review, administrative review, or a program audit? | ☐ | ☐ | ☐ |
| Does the SFA has procedures in place to monitor the FSMC's contract compliance? | ☐ | ☐ | ☐ |
| Is documentation of monitoring is maintained? | ☐ | ☐ | ☐ |
| Has the FSMC staffing plan been approved by the SFA? | ☐ | ☐ | ☐ |
| Have staffing plan been followed per the Contract? | ☐ | ☐ | ☐ |
| Has the SFA retained all food service responsibilities not allowed to be delegated to the FSMC?<br>If "no," list what was delegated: | ☐ | ☐ | ☐ |
| FSMC's food service operations are monitored by the SFA through periodic on-site visits to ensure that the food service is in conformance with program regulations and that program review and audit findings are resolved. | ☐ | ☐ | ☐ |
| Is documentation of monitoring maintained? | ☐ | ☐ | ☐ |
| Have all responsibilities of the sponsor and the FSMC been implemented as defined by the terms of the contract?<br>If no, explain. | ☐ | ☐ | ☐ |

| **Procurement Requirements** | **Yes** | **Needs Improvement** | **N/A** |
|---|---|---|---|
| Did the SFA follow the appropriate procurement procedures when awarding the FSMC contract including preparing all contract documents? (These documents include, but are not limited to, bid specifications, the RFP, the contract, and any contract amendments.) | ☐ | ☐ | ☐ |
| Were there an adequate number of qualified RFP responses to permit reasonable competition? | ☐ | ☐ | ☐ |
| Was the RFP publicized and any reasonable requests by other sources to compete were honored to the maximum extent practicable? | ☐ | ☐ | ☐ |
| Was the FSMC awarded the contract based on the SFA-provided mechanisms for technical evaluation of the proposals ?<br><br>Was the contract awarded to the responsible offeror whose proposal was the most advantageous to the SFA with price and other factors considered (with price as the primary factor)? | ☐<br><br>☐ | ☐<br><br>☐ | ☐<br><br>☐ |
| ~~Were unsuccessful offerors were notified promptly?~~ | ☐ | ☐ | ☐ |

| **List Corrective Actions taken for all "Needs Improvement" items.** | **Date of Implementation** |
|---|---|
| | |

Other Comments:

| Signature of FSMC Representative: | Title: | Date: |
|---|---|---|
| Signature of SFA Official: | Title: | Date: |

**FSMC Monitoring of Discounts, Rebates and Credits and USDA Foods Values**

Commercial Foods
Discounts, Rebates, Credits
USDA Foods

**Cost Reimbursable Solicitation**
Require FSMC to indicate Frequency and type of discounts, rebates, and credits that will be represented on invoices.

NOI:
FFS:
Direct Discount:
Rebate System:

**Cost Reimbursable Contract**
Assure that the frequency is begin adhered to and look to see that discounts, rebates, and credits identified in solicitation are represented on invoices (collect sample of invoices depending on frequency)
NOI:
FFS:
Direct Discount:
Rebate System:

**Fixed Price Solicitation**
FSMC will take discounts, rebates, and credits into consideration up front and will include that value in their Fixed Price. (Explain)
NOI:
FFS:
Direct Discount:
Rebate System:

**Fixed Price Contract**
NOI:
FFS:
Direct Discount:
Rebate System:

## Value pass-through Methods to APPENDIX G

**DIRECT DISCOUNT**: In the direct discount method, a competitively procured processor sells finished end product directly to the recipient at a discount from the commercial price (based on the value of the USDA Food contained in the end product). In this method, the SFA's competitively procured distributor becomes a billing agent for a processor.

The SFA must procure the services of the processor and the SFA may have to procure the services of a commercial distributor to provide storage and distribution for the end product. *See* FD-040: State Processing, *Commondity Inventory Reduction at Further Processors*, dated January 12, 2005.

**FEE FOR SERVICE:** Under a fee for service system, a processor delivers finished product to a location chosen by the recipient. The processor bills the recipient directly. The processor may reduce book inventory when the recipient agency is billed. By billing the recipient, the processor asserts that the agreement has been fulfilled by delivery of the finished product to the location designated by the recipient. Even if the location is a commercial distributor, the processor delivers the finished product to a location chosen by the recipient and bills the recipient directly. The Agreement has been fulfilled by delivery of the finished product. *See id.*

**HYBRID/NET OFF INVOICE: (INDIRECT DISCOUNT THROUGH A DISTRIBUTOR)** The processor delivers finished end products to a commercial distributor who then sells the product to an eligible recipient at a discounted price based on the value of the donated food that is contained in the end product. FNS cannot assume that the finished product delivered by the processor will be sold to an eligible recipient by the distributor. Therefore, the processor may not reduce book inventory until documentation is provided by the distributor that shows a sale to an eligible recipient has occurred. This documentation may either be a rebate application from the distributor or a "sales velocity report" that identifies the finished product that was sold and the eligible recipient that bought the product. *See id.*

**INDIRECT DISCOUNT SALES:** a distributor sells end products received from processors to school food authorities (SFAs) or other recipient agencies at a discount from the gross commercial case price, to account for the value of the donated foods contained in or used to produce the end products. The distributor must subsequently submit an application for a refund or rebate to the processor in order to receive compensation for the discount provided to the SFA. See FD-007: Processing (Revised) *Sales of End Products through Commercial Distributors Indirect Discount and Net Off Invoice,* dated December 30, 2011.

**NET OFF INVOICE (NOI):** permits a distributor to request, or receive, such compensation through its electronic sales velocity reports, or other automated sales reports, which also serve to notify the processor of end product sales. Once such sales reports are received, the processor can report end product sales and inventory reductions of donated foods to the State distributing agency (SDA) in its monthly performance reports. The processor and the distributor must work out the logistics of compensating

the distributor for the donated food value. Processed end products can only be sold at a discount if the processor has an approved end product data schedule and the end product has been approved by the SDA. Before a processor is allowed to draw down inventory, it must verify that the customer is an eligible recipient agency. *See id.*

**REBATE SYSTEM:**
If a processor is using the rebate system, inventory should be drawn down when the processor issues the rebate to the recipient. The rebate should be paid under the EPDS (End Product Data Schedules) price that is in effect at the time of payment. FNS cannot assume that the finished end product will be sold to an eligible recipient by the commercial distributor. The processor should not reduce inventory at the time of delivery to the commercial distributor. See FD-040: State Processing, *Commodity Inventory Reduction at Further Processors*, dated January 12, 2005.

# Appendix H: Sample Debarment and Suspension Form

[*State agency or Local Educational Agency*]

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**SAMPLE**

**Debarment and Suspension and Other Responsibility Matters Primary Covered Transactions**

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Non-federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

**(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)**

(1) The prospective primary participant certifies to the best of its knowledge and belief that it and its principals:

(a) Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective primary participant shall attach an explanation to this proposal.

Business Name _____

Date _____ By _____

Name and Title of Authorized Representative

_____

Signature of Authorized Representative

# Appendix I: Certification Regarding Lobbying

**[*State agency or Local Education Authority Name*]**
**Certification Regarding Lobbying**

**Applicable to Grants, Sub-grants, Cooperative Agreements, and Contracts Exceeding $100,000 in Federal funds. Contractors that apply or bid for such an award must file the required certification.**

Submission of this certification is a prerequisite for making or entering into this transaction and is imposed by section 1352, Title 31, U.S. Code. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, an employee of a Member of Congress, or any Board Member, officer, or employee of [School] Independent School District in connection with the awarding of a Federal contract, the making of a Federal grant, the making of a Federal loan, the entering into a cooperative agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, an employee of a Member of Congress, or any Board Member, officer, or employee of [School] Independent School District in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all covered sub-awards exceeding $100,000 in Federal funds at all appropriate tiers and that all sub-recipients shall certify and disclose accordingly.

_____

_____

_____
Name/Address of Organization

_____
Name/Title of Submitting Official

_____
Signature Date