

Procurement Section



DRAFT

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PROCUREMENT PROCEDURES AND PRACTICES

- A. The primary purpose of procurement is to assure that open and free competition exists to the maximum extent possible. The procurement procedures practiced by a school food authority (SFA) must not restrict or eliminate competition. For example, descriptions of goods, equipment, or services to be procured should not contain features that unduly restrict competition. *A person (contractor or vendor) who develops or drafts specifications, requirements, statements of work, Invitations to Bid (ITB), Requests for Proposal (RFP), contract terms and conditions, or other documents for use by a grantee or subgrantee conducting procurement under the United States Department of Agriculture (USDA) entitlement programs shall be excluded from competing for such procurements.* (Reference USDA Policy Memo 2006-SNP-06) Competition helps assure that goods, equipment, and services will be obtained at the lowest possible cost. All procurements must be obtained through competition. The actual type of procurement method used is of secondary importance. Of primary importance is that open and free competition exists when purchases are made. Each SFA must have protest procedures in place to handle any protest a district may receive concerning its procurement practices. A Procurement Self-Review form can be found on [page P-39](#).
- B. Purchases made for individuals through the Child Nutrition Program (CNP) account are not allowable. If an SFA makes this a practice, the tax-exempt status of that SFA could be placed in jeopardy. In addition, food cannot be purchased for individuals through a vendor, even if the individual is paying the appropriate sales tax and the full price for the item. This would be receiving a favor from the vendor and would violate the code of conduct established by the SFA.
- C. **Geographic Preference**—The use of statutorily or administratively imposed in-state or local geographic preferences for procurements under USDA entitlement programs is prohibited, except for unprocessed locally grown or locally raised agricultural products. The Food, Conservation, and Energy Act of 2008 (Public Law 110-246, Section 4302), amended Section 9(j) of the National School Lunch Act (NSLA) to allow institutions receiving funds through CNP to apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products.

When geographic preference is used, an SFA must still get quotes from several farmers when procuring unprocessed locally grown or locally raised agricultural products so that competitors have an opportunity to compete for the bid. The way in which a geographic preference is applied could depend on whether the procurement method is informal or formal. If informal (i.e., falling below the small purchase threshold), an SFA may simply want to approach a minimum of three local producers and obtain price quotes. Competition is ensured by developing a solicitation that contains criteria that all the respondents will be subject to. If the procurement exceeds the small purchase threshold, a formal procurement method must be used that would involve the sealed bidding process (i.e., IFB) or the competitive negotiation process (i.e., RFP). This would entail public notification of the solicitation; however, when procuring locally unprocessed agriculture products, the notification may be focused on the locale in which the school is situated as a criteria of the solicitation. In a situation where the solicitation for locally unprocessed agricultural products is in fact open to offerors beyond the local area, a way in which to apply a geographic preference is to grant preference points to the local farmers who respond to the solicitation. (Reference USDA Policy Memo 2009-SP-11 and SP-03-2013.)

- D. Soliciting Bids From Commercial Distributors for End Products/Commodity Processing/Diverted Commodities (Reference USDA Policy Memo 2012-FD-119)
1. In most cases, SFAs solicit bids for procurement of commercial food products from commercial distributors and, in a separate solicitation, solicit bids for procurement of end products from processors, even when identical food products are sold commercially through distributors.

2. In instances where the services of a processor have already been procured by a commercial distributor in accordance with federal procurement requirements, the SFA may solicit bids from that commercial distributor to procure both commercial food products and end products as long as the solicitation and resulting contract clearly address the specific requirements relating to end products. In the solicitation, the SFA must provide for the following:
 - a. End products must be obtained from a processor that has a state processing agreement (or state participation agreement, as appropriate) with the state distributing agency (Department of Human Services—DHS).
 - b. Only end products with approved end product data schedules, and that meet substitution and grading requirements in 7 CFR §250.30, may be provided.
 - c. The SFA must receive credit for the value of the USDA Foods contained in the end products, either through a discount from the gross case price or a refund or rebate after the sale of the end product.
 - d. The distributor must collaborate with the processor to ensure that the SFA is an eligible recipient of end products and to ascertain the quantity of end products, or the value of donated food, for which the SFA is eligible.
 - e. The distributor must provide notification to the processor of end product sales so that the appropriate inventory draw-down may occur.

NOTE: SFAs may continue to use their Department of Defense (DoD) Fresh Fruit and Vegetable Program (FFVP) vendor (after expending their DOD dollars) without conducting a procurement process.

3. DoD Purchases

USDA has clarified how SFAs may use funds provided under Sections 4 and 11* or 19 of the National School Lunch Act (NSLA), 42 U.S.C. 1751, to purchase fresh fruits and vegetables from DoD Fresh Fruit and Vegetable Program (DoD Fresh) vendors.

SFAs may not contract with individual vendors noncompetitively to purchase products using Sections 4 and 11 or FFVP funds, even if the same vendors already provide the SFA with product through DoD Fresh using Section 6 funds. Rather, SFAs must meet the competition requirements in 7 CFR 3016.36(c). These regulations require SFAs to conduct either an informal or formal procurement, depending on whether the estimated value of the purchase is above or below the most restrictive applicable small purchase threshold (federal, state, or local). In conducting the procurement, it is permissible for SFAs to include vendors who provide services through DoD Fresh when soliciting bids. After evaluating all bids, if the SFA determines that the DoD Fresh vendor's bid is the winning submission, the SFA must directly contract with the vendor as it would any other commercial procurement. It is not permissible for SFAs to place orders through DoD's FFAVORS system for any purchases, either formally or informally, to be paid with Sections 4 and 11 or FFVP funds. SFAs that are currently using FFAVORS for purchases paid for with Sections 4 and 11 or FFVP funds will no longer be able to do so beginning in school year (SY) 2014-2015. (Reference USDA Memo SP-25-2014)

* Section 4 funds are the SFA's reimbursements for the paid meals and Section 11 funds are the SFA's reimbursements for the free and reduced-price meals.

4. Coordination Between the SFA and DHS

The SFA must coordinate with the DHS to ensure that processors providing food products to its commercial distributor have a state processing or participation agreement with the DHS. Multistate processors must also have a National Processing Agreement with the Food and Nutrition Service (FNS). The SFA may only order USDA Foods for delivery to processors that have such agreements in place. The SFA must also verify with DHS the types of approved end products, the quantity of end products that it is eligible to receive, and the value of USDA Foods contained in the end products. DHS must ensure that the SFA is aware of any restrictions in the state processing or participation agreement relating to approved end products or methods of end product sales, or other provisions. Such restrictions must be included in the SFA's solicitation for the services of a commercial distributor.

5. Coordination Between the Distributor and Processor

The distributor and processor should collaborate closely to ensure that processed end products are provided only to SFAs eligible to receive them. In many cases, end products will be identical to commercial products; i.e., the commercial products meet substitution requirements in 7 CFR §250.30(f) and grading requirements in 7 CFR §250.30(g) for the processing of USDA Foods. In such cases, the distributor may commingle commercial food products and end products at its facility and sell such commingled food products to any of its customers. Sales of such food products to the SFA must ensure provision of credit for the value of USDA Foods for the quantity of end products that the SFA is eligible to receive. However, for end products produced from nonsubstitutable USDA Foods (i.e., beef and pork), the distributor must ensure that only the SFA receives such end products.

The distributor must notify the processor of its sales of end products to the SFA in a timely manner so that the processor may report such sales and reductions of donated food inventories to DHS in its monthly performance reports. Such notification may be provided by electronic means; e.g., through sales velocity reports or other automated sales reports.

METHODS OF PROCUREMENT

A. Small Purchase Procedures—Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, goods, or equipment that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11), currently set at \$150,000.

1. When small purchase procedures are used, the following stipulations and terms must be considered:

- a. The SFA can set a lower threshold than \$150,000.
- b. Price quotes shall be obtained from an adequate number of qualified sources. USDA defines an adequate number as three.
- c. The goods, equipment, or services to be purchased must be adequately and consistently described for each prospective supplier so that each one can provide price quotes on the same merchandise or service. These specifications must be either verbal or written. Both must be documented.

(1) Send specifications by fax, e-mail, telephone, or deliver in person to at least three vendors.

(2) Responses from vendors can be either written or verbal form. Verbal quotes must be documented.

- d. Price quotation records must be retained three years plus the current year or until audit findings are resolved.

e. May include fresh produce as long as the aggregate amount is \$150,000 or less.

f. Equipment acquisitions of \$5,000 or more per item: State agencies are required by 2 CFR §225 to grant prior approval for any piece of equipment purchased. USDA Memo SP-31-2014 allows state agencies to grant blanket approval for items commonly used in kitchens. Items listed below, in any form, costing \$5,000 or more and used for the sole purpose of CNP, have blanket approval from the State Agency.

- | | | |
|---|--|--|
| <ul style="list-style-type: none">• Floor mixers• Griddle• Freezer• Braising pan/
tilting skillet• Steam table• Buffalo chopper/
vertical cutter• Vent hoods• Milk boxes | <ul style="list-style-type: none">• Oven—convection or conventional• Steamer• Warming/cooling table• Combination oven/steamer• Food slicer• Serving lines• Hot water tank• Proofer• Steam kettle• Refrigerated salad bars | <ul style="list-style-type: none">• Range/stove• Refrigerator/cooler
(walk-in or reach-in)• Gas range• Dish machine• Transport carts• Booster for dish washer• Warming cart• Grease traps• Kiosk or mobile food carts• Refrigerated display cases |
|---|--|--|

B. **Sealed Bids**—Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the ITB, is the lowest in price.

1. Sealed bids are feasible if the following conditions are met:

- Complete, adequate, and realistic specification or purchase description is available.
- Two or more responsible bidders are willing and able to compete effectively for the business.
- The procurement lends itself to a firm fixed-price contract and bidder is selected principally on price.

2. Sealed Bids/Requirements:

- The ITB must be publicly advertised.
- Bids shall be solicited from an adequate number of known suppliers (at least three).
- All vendors shall be provided sufficient time prior to the date set for the bid opening.
- All specifications and pertinent information shall define the items or services in order for the bidder to properly respond.
- All bids will be publicly opened at the time and place prescribed in the ITB.
- A firm, fixed-price contract will be awarded to the lowest responsive and responsible bidder.
 - Where specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest.
 - Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.
- Any or all bids may be rejected for a sound reason and must be documented.

C. **Competitive Proposals**—Procurement by *competitive proposals*: The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement-type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.

1. Competitive Proposals/Requirements:

- a. A Request for Proposal (RFP/ITB) will be publicized and will identify all evaluation factors and their relative importance. Any response to publicized RFPs shall be honored to the maximum extent practical.
- b. Proposals will be solicited from an adequate number of qualified sources (at least three).
- c. SFAs will have a method for conducting technical evaluations of the proposals received and for selecting awardees.
- d. Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.
- e. Architectural/engineering professional services (A/E):
 - (1) Competitors' qualifications are evaluated, and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
 - (2) Lowest price is not a factor when selecting an A/E firm; however, purchasing of an A/E firm's services is the only procurement where price is not considered.

D. **Noncompetitive Proposals**—Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source; or after a solicitation of a number of sources, competition is determined inadequate.

1. Noncompetitive proposals may be used when:

- a. Award of the contract is not feasible under small purchase procedures, sealed bids, or competitive proposals ***and at least one of the following circumstances apply:***
 - (1) The item is available only from a single source.
 - (2) Emergency circumstances will not permit a delay resulting in competitive solicitation.
 - (3) Competition is determined to be inadequate after solicitation of a number of sources.
 - (4) Awarding agency authorizes noncompetitive proposals.

2. Noncompetitive proposal requirements:

- a. Cost analysis (i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits) is required.

- (1) SFAs must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation; but as a starting point, SFAs must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost; e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.
 - (2) SFAs will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.
 - (3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles. SFAs may reference their own cost principles that comply with the applicable federal cost principles.
 - (4) The cost-plus-a-percentage-of-cost and percentage of construction cost methods of contracting shall not be used.
- b. The SFA may be required to submit proposed procurement to the Oklahoma State Department of Education (the *State Agency*) for preaward review.
- c. The SFA will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible. Affirmative steps shall include:
- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists.
 - (2) Assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources.
 - (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises.
 - (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses and women's business enterprises.
 - (5) Using the services and assistance of the Small Business Administration (SBA) and the Minority Business Development Agency of the Department of Commerce.
 - (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed above.

REVIEWING THE AWARD

- A. SFAs must make available, upon request of the State Agency, technical specifications on proposed procurements where the State Agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the SFA desires to have the review accomplished after a solicitation has been developed, the State Agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.
- B. SFAs must, on request, make available for State Agency preaward review procurement documents such as RFPs, ITBs, and independent cost estimates when:
 - 1. SFA's procurement procedures or operation fails to comply with the procurement standards in this section.
 - 2. The procurement is expected to exceed the \$150,000 threshold and is to be awarded without competition or only one bid to offer is received in response to a solicitation.
 - 3. The procurement, which is expected to exceed the \$150,000 threshold, specifies a *brand name* product.
 - 4. The proposed award is more than the \$150,000 threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement.
 - 5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the \$150,000 threshold.
- C. SFAs will be exempt from the preaward review in paragraph B above if the State Agency determines that its procurement system complies with procurement standards.
 - 1. SFAs may request that their procurement systems be reviewed by the State Agency to determine whether their systems meet these standards in order for their systems to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding and third-party contracts are awarded on a regular basis.
 - 2. An SFA may self-certify its procurement system. Such self-certification shall not limit the State Agency's right to survey the system. Under a self-certification procedure, the State Agency may wish to rely on written assurances from the SFA that it is complying with these standards. An SFA will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

BONDING REQUIREMENTS

For construction or facility improvement contracts or subcontracts exceeding the \$150,000 threshold, the State Agency may accept the bonding policy and requirements of the SFA provided the State Agency has made a determination that the State Agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

- A. ***A bid guarantee from each bidder equivalent to 5 percent of the bid price.*** The *bid guarantee* shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his or her bid, execute such contractual documents as may be required within the time specified. (Reference 7 CFR §225.15 [h][7])

- B. ***A performance bond on the part of the contractor for 100 percent of the contract price.*** A ***performance bond*** is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
- C. ***A payment bond on the part of the contractor for 100 percent of the contract price.*** A ***payment bond*** is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

CONTRACT PROVISIONS

Federal agencies are permitted to require changes, remedies, changed conditions, access and record retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy. An SFA's contracts must contain these provisions:

- A. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms and provide for such sanctions and penalties as may be appropriate (contracts more than the \$10,000 threshold). (Reference 7 CFR §3016.36[i])
- B. Termination for cause and for convenience by the SFA, including the manner by which it will be effected and the basis for settlement (all contracts in excess of \$10,000). (Reference 7 CFR §3016.36[i])
- C. Compliance with Executive Order 11246 of September 24, 1965, entitled ***Equal Employment Opportunity***, as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (all ***construction*** contracts awarded in excess of \$10,000 by an SFA and its contractors or subcontractors). (Reference 7 CFR §3016.36[i])
- D. Compliance with the ***Copeland Anti-Kickback Act*** (18 U.S.C. 874), as supplemented in Department of Labor regulations (29 CFR Part 3) (all contracts and subgrants for ***construction*** or repair).
- E. Compliance with the ***Davis-Bacon Act*** (40 U.S.C. 276a to 276a-7), as supplemented by Department of Labor regulations (29 CFR Part 5) (***construction*** contracts in excess of \$2,000 awarded by an SFA).
- F. Compliance with Sections 103 and 107 of the ***Contract Work Hours and Safety Standards Act*** (40 U.S.C. 327-330), as supplemented by Department of Labor regulations (29 CFR Part 5) (***construction*** contracts awarded by an SFA in excess of \$2,000 and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers).
- G. Notice of State Agency requirements and regulations pertaining to reporting.
- H. Notice of State Agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
- I. State Agency requirements and regulations pertaining to copyrights and rights in data.
- J. Access by the SFA, the State Agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

- K. Retention of all required records for three years after the SFA makes final payments and all other pending matters are closed.
- L. Compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857[h]), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency (EPA) regulations (40 CFR Part 15) (contracts, subcontracts, and subgrants in amounts in excess of \$150,000).
- M. Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Public Law 94-163, 89 Statute 871).
- N. Any approved contracts (except those for food service management companies [FSMCs] and state contracts) may be renewed year after year if the language in the RFP addresses renewals. FSMC contracts may only be renewed each year for a maximum of four years after the initial contract year if it is addressed in the RFP.
- O. Cost Reimbursable Contracts (Cost Plus Fee)—Required Provisions (Reference USDA Policy Memo SP-33-2010)
 - 1. Allowable costs paid from the nonprofit school food service account must be net of all discounts, rebates, and applicable credits. (Reference Section 12[n] of the NSLA and §210.21[f])
 - a. 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 SFA.
 - b. The contractor must separately identify for each cost submitted for payment to the SFA 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.

- c. The contractor's determination of its allowable costs must be made in compliance with the applicable USDA and program regulations and OMB cost circulars.
- d. The contractor must identify the amount of each discount, rebate, and other applicable credit on bills and invoices presented to the SFA for payment and 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.
- e. 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 the conclusion of the contract.
- f. The contractor must maintain documentation of costs and discounts, rebates, and other applicable credits and must furnish such documentation upon request to the SFA, the State Agency, or USDA.

PROHIBITED EXPENDITURES

No expenditures 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.

- A. Contracts that have a term of more than 12 months may delay implementation up to 24 months when the solicitation for the contract was issued prior to the effective date of this regulation, **with State Agency approval**.

PROCUREMENT PLAN

Each SFA shall have on file a written procurement plan approved by the local school board. The procurement plan identifies the SFA's purchasing periods for the goods, equipment, and services related to the CNP. In addition, the plan documents the various methods of procurement being practiced.

The procurement plan provides justification for using a certain procurement method to obtain an item. The scope of the plan is determined by the organization of the SFA. If procurement is decentralized, the plan may apply to all sites responsible for purchasing or each school may be permitted to develop its own plan. A new procurement plan does not need to be developed every year. However, an annual review of the approved plan is suggested to assure its relevance to current procedures. An example of a procurement plan is on **pages P-15 through P-29**.

A. Allowable Procurement Practices

1. Obtaining publicly available information such as:
 - a. Product brochures, product specification handouts, etc.
 - b. Information obtained from the Internet.
 - c. Information/recommendations obtained from other food service personnel.
 - d. Information obtained by visiting food service operations, industry and professional trade shows.
 - e. Trade journal information.
2. Obtaining information from manufacturers and distributors, including:
 - a. Recommendations of one product versus another product.
 - b. Features that make one product different from another.
 - c. The price for the product.
 - d. The price for specific features.
 - e. The model number, make, and manufacturer of products that may be acceptable.
 - f. Specification sheets and product information handouts.

B. Unallowable Procurement Practices

1. For cost plus fee contracts, SFAs are prohibited from using nonprofit school food service account funds to pay any amount above net allowable costs, computed by deducting certain rebates, discounts, and other credits.
2. For cost plus fee contracts, contractors are required to identify appropriate information to permit SFAs to identify allowable and unallowable costs and the amount of all such discounts, rebates, and credits on invoices and bills presented for payments.
3. Allowing a potential contractor to write the bid or proposal terms, product specifications, procurement procedures, or contract terms.
4. Allowing a potential contractor to evaluate bids or proposals submitted by competitors.
5. Delegating bid/proposal acceptance or recommendation for acceptance to a potential contractor competing on the procurement.
6. Allowing a potential contractor access to sealed bid information before the bids are publicly opened.
7. Disclosing the content of proposal offers submitted by others to a potential supplier prior to the supplier submitting an offer.
8. Negotiating under the formal advertising method (sealed bid) of procurement.
9. Accepting nonresponsive bids or offers.
10. Cost-plus-a-percentage-of-cost method of procurement is prohibited.

C. Code of Conduct

The local SFA must maintain a written code or standard of conduct that governs the performance of its officers, employees, or agents who are engaged in the award and administration of contracts supported by program funds. An example of a procurement plan that includes the required principles for the Code of Conduct begins on **page P-16**.

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EXAMPLE OF PROCUREMENT PLAN FOR SMALL SCHOOL DISTRICTS

SCHOOL FOOD AUTHORITY: _____ PROCUREMENT PLAN FOR CHILD NUTRITION PROGRAMS

The _____ School Food Authority (SFA) will purchase food and other items for use in the Child Nutrition Programs (CNP) in compliance with 7 CFR Part 3016 and State Law, using the procedures outlined as follows and the attached Chart of Procedures.

The primary purpose of this procurement plan is to assure that open and free competition exists to the maximum extent possible. The procurement procedures practiced by the SFA must not restrict or eliminate competition. For example, description of goods, equipment, or services to be procured should not contain features that unduly restrict competition. Competition helps assure that goods, equipment, and services will be obtained at the lowest possible cost.

Small Purchase Procedures will be used to purchase goods, equipment, and services where the aggregate cost is less than \$150,000, including fresh produce.

When small purchase procedures are used, the following conditions, stipulations, and terms must be met:

- The goods, equipment, or services to be purchased will be adequately and consistently described for each prospective supplier so that each one can provide price quotes on the same merchandise or service. These specifications may be either verbal or written. Both must be documented.
- Specifications/food descriptions must be sent by fax or e-mail or communicated by telephone or in person to at least three vendors.
- Responses from vendors can be in either written or verbal form. Verbal quotes must be documented. The Purchase Documentation Form and/or Vendor Contract Form contained herein will be used for this purpose.
- Price quotation response will be retained by the SFA with other program documentation and records for a period of three years after the end of the fiscal year to which they pertain or until the findings of audits are resolved. The Purchase Documentation Form and/or Vendor Contract Form contained herein will be used for this purpose.

Noncompetitive Proposal will be used only when the procurement is not feasible under small purchase procedures, sealed bid (formal advertising), or competitive proposals. The decision to use noncompetitive proposal will be justified in writing and be available for audit and review.

Circumstances under which a procurement may be conducted by noncompetitive proposal will be limited to one of the following:

- The merchandise or service is available only from a single source.
- An emergency exists, and the urgency for the requirement will not permit the delay involved with sealed bids (formal advertising) or competitive proposal.
- After solicitation from a number of sources, competition is found to be lacking.

Code of Conduct. The following conduct will be expected of all persons who are engaged in the award and administration of contracts supported by CNP funds.

- No employee, officer, or agent of the _____ SFA shall participate in selection or in the award or administration of a contract supported by program funds if a conflict of interest, real or apparent, would be involved.
- Conflicts of interest arise when one of the following has a financial or other interest in the firm selected for the award:
 - The employee, officer, or agent
 - Any member of his/her immediate family
 - His or her partner
 - An organization which employs or is about to employ one of the above
- _____ SFA employees, officers, or agents shall neither solicit nor accept gratuities, favors, or anything of material/monetary value from contractors, potential contractors, or parties to subagreements.
- The purchase during the school day of any food or service from a contractor for individual use is prohibited.
- The outside sale of such items as used oil, empty cans, and the like will be sold by contract between the _____ SFA and the outside agency. Individual sales by any SFA employee to an outside agency or any other SFA employees is prohibited.
- Failure of any employee to abide by the above-stated code could result in a fine or suspension or both, or dismissal. Interpretation of the code will be given at any time by contacting _____ at _____. The _____ SFA will not be responsible for any other explanation or interpretation which anyone presumes to make on behalf of the Board.
- No item, food, or beverage purchased with nonprofit school food service funds will be removed from the school premises by school personnel.

Changes in this Procurement Plan will be made as conditions warrant upon the approval of the SFA.

This plan adopted by the Board of the _____ at the regularly scheduled meeting on this, the _____ day of _____ in the year _____ .

Signatures: _____
SFA Official

Clerk of the Board

CHART OF PROCEDURES

The _____ SFA will purchase the following products or group of products and services as per the stated purchase period using the identified procurement method. *Price quote time frame* period is defined as the time frame for which bids or quotes are obtained and awarded.

<i>PRODUCT</i>	<i>PRICE QUOTE TIME FRAME</i>	<i>PROCUREMENT METHOD USED</i>
Milk	_____	_____
Bread	_____	_____
Canned fruits	_____	_____
Canned vegetables	_____	_____
Frozen fruits	_____	_____
Frozen vegetables	_____	_____
Preprepared fruits and vegetables	_____	_____
Fresh fruits	_____	_____
Fresh vegetables	_____	_____
Meats	_____	_____
Paper products	_____	_____
Chemicals	_____	_____
Small equipment	_____	_____
Large equipment	_____	_____
_____	_____	_____
_____	_____	_____

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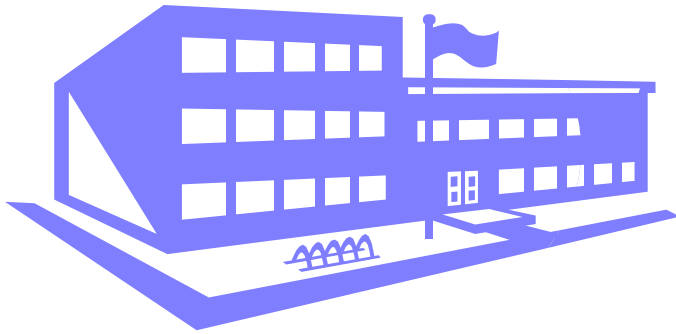
STRATEGIES IN DEVELOPMENT OF SPECIFICATIONS

- A. Writing specifications may be the most challenging and important step in the purchasing process. The primary objective of good specification writing is to assure the acquisition of what you want and need. A *planned menu* is the starting point in which to make decisions regarding what to purchase. ***Do not accept price printouts from the vendor (these are NOT specifications).***
- B. Consider the following questions when developing specifications:
1. Is the item readily available?
 2. Is the price affordable?
 3. Has acceptability been determined?
 4. What type of product will meet the need?
- C. Specifications should be:
1. Simple, but precise.
 2. Identified with terms used in the marketplace; i.e., size, count, diameter, grade (quality), pack.
 3. Capable of being met by several bidders.
 4. Clear and understandable.
 5. Include the item descriptions, product specification, pack size, bid unit, estimated quantity, and unit price.
- See **pages 24** through **27** for examples of specifications.
- D. Specifications Cover Letter—A cover letter should be included when specifications are sent to vendors. The specification letter should include:
1. Institution letterhead.
 2. Date of letter.
 3. Copy of specifications.
 4. A method of response.
 5. The method of evaluation.
 6. The method of acceptance of successful responses.
 7. Deadline for bid.
 8. Bid/price quote contract period.
 9. Delivery times and places.

10. HACCP compliance requirement.
11. Ordering procedures.
12. Substitutions and shortages.
13. Special conditions (i.e., Nutrition Facts labels).
14. Termination for cause.

E. Bid Awards/Price Quote Selection

1. Awarding line item—Bid is awarded by each product separately to the lowest bidder.
2. Awarding class—Award or selection is made by categories.
3. Awarding bottom line—Bidder with lowest price receives award based on ***TOTAL*** price when all items are combined.
4. Awarding prime vendor—When 80 percent or more of food is purchased from one source.



MODINE PUBLIC SCHOOLS
1234 MODINE AVENUE
MODINE, OKLAHOMA 00000

EXAMPLE OF A SPECIFICATION LETTER

July 6, 20__

Modine Public Schools announces the opportunity for responsible bidders from the food industry to respond to the attached food specifications valid for the period of **August 6, 20__**, to **December 17, 20__**. All bidders wishing to respond to this bid period must do so by **2 p.m., July 31, 20__**, at the Education Service Center at the above address. No e-mail or facsimile responses will be accepted.

No other format for the bid response other than the attached specification forms will be accepted. Responses will be evaluated based on the following criteria:

- Best price
- Meeting food descriptions
- Quantity availability
- Past history, if applicable
- Quality of food
- Meeting delivery requirements

Vendors will be expected to ensure that deliveries to Modine Public Schools will be dropped at 1234 Modine Avenue on Mondays and Tuesdays between the hours of 1 to 3 p.m. Delivery trucks and product drops must be HACCP-compliant. Sales staff will provide on-site, phone, or e-mail/online ordering methods with e-mail/online confirmation of orders. Any vendors making substitutions of product must provide equal or better quality at bid price and meet original specifications.

Nutrition Facts information or Nutrition Facts labels must be provided on all products. Bids will be evaluated on a *per line* item basis.

Modine Public Schools reserves the right to accept or reject any part, or all, of the bid you submit. If all criteria contained within this document are met, successful bidders will be considered.

Bids will be awarded on August 6, 20__, and all bidders will be notified in writing. Modine Public Schools reserves the right to terminate a vendor who is awarded business but does not follow through with the above requirements.

SPECIFICATIONS—page 1 of 4

Item Description	Product Specification	Pack Size	Bid Unit	Est Quantity	Unit Price	Comments
Fruits/Vegetables						
Apples, canned	U.S. Grade C, water-packed	6/10	Case			
Applesauce, canned	U.S. Grade A, texture regular	6/10	Case			
Fruit for salads, canned	U.S. Grade B, fruit juice medium	6/10	Case			
Fruit cocktail, canned	U.S. Grade B, fruit juice medium	6/10	Case			
Peaches, canned	U.S. Grade B standard, halves, 35/40 count, Clingstone, fruit juice	6/10	Case			
Peaches, canned	U.S. Grade B standard, slices, Clingstone, fruit juice medium	6/10	Case			
Pears, canned	U.S. Grade B standard, Bartlett, halves, 50/60 count, fruit juice and water medium	6/10	Case			
Pears, canned	U.S. Grade B standard, Bartlett, sliced, fruit juice medium	6/10	Case			
Pineapple, canned	U.S. Grade C standard, medium slices, light syrup, product of Hawaii, Philippines, or Thailand only	6/10	Case			
Pineapple, canned	U.S. Grade B standard, crushed, solid pack in juice, product of Hawaii, Philippines, or Thailand only	6/10	Case			
Pumpkin, solid-pack	U.S. Grade B, good flavor, aroma, color, and texture	6/10	Case			
Beans, green, canned	Grade A standard, Blue Lake variety, #3 or #4 size cut	6/10	Case			
Peas, black-eyed, dry, canned	Cooked with seasoning, brandlike Allen's	6/10	Case			
Beans, Great Northern, dry	U.S. Grade B, per pound	6/10	Case			
Carrots, canned	U.S. Grade A standard, sliced, size less than 1 1/2 inch	6/10	Case			
Corn, canned	U.S. Grade A standard, golden, vacuum-pack	6/10	Case			

EXAMPLE ONLY

SPECIFICATIONS—page 2 of 4

Item Description	Product Specification	Pack Size	Bid Unit	Est Quantity	Unit Price	Comments
Fruits/Vegetables Peas and carrots, canned	U.S. Grade A standard, carrots to be diced, packing medium to be without salt	6/10	Case			
Peas, green, canned Potatoes, French-fried, frozen	U.S. Grade A standard, #3 size Oven-ready, U.S. Grade A standard, crinkle-cut, 1/2 x 1/2 inch, 30% to 34% solid, approved brands equivalent to: ABC Foods A-103, DEF Foods X502, Pots R29	6/10 6/5 lb	Case Case			
Tomatoes, canned	Grade B standard, peeled, diced	6/10	Case			
Vegetable blends, frozen	Stew vegetables, mixture contains potatoes, carrots, celery, onion, predominance to be order listed	12/2 lb	Case			
GRAINS/BREADS Muffins, frozen	Whole grain-rich flour, fat per muffin not to exceed 5 g, round style, minimum 1 oz, maximum 2 oz, bulk pack only, produced by commercial bakery methods in commercial bakery	Individually wrapped	Case			
Pasta: spaghetti	Made from whole grain-rich semolina and durum wheat flour, 10 lb only	10-lb box	Pound			
Pasta: egg noodles	Whole grain-rich, flat ribbon shape, medium width, made from enriched semolina durum flour	10-lb box	Pound			
Waffle, frozen	Waffle, frozen, regular, plain, round, whole grain-rich flour, 0.8 oz each, poly pouch packed	144 count	Case			

EXAMPLE ONLY

SPECIFICATIONS—page 3 of 4

Item Description	Product Specification	Pack Size	Bid Unit	Est Quantity	Unit Price	Comments
<p>Meat/Meat Alternate Beef patty, fully cooked, frozen</p>	<p>Ground beef patty, fully cooked, frozen, IMPS 631, minimum 2 1/2 oz, maximum 3 1/2 oz, CN-labeled to provide 2 oz meat/meat alternate, IQF, natural char marks, cooking temperatures to comply with FSIS requirements, approved brands: D924, C568, B234</p>	<p>Please specify portions</p>	<p>Case</p>			
<p>Bologna, turkey, frozen</p>	<p>Sliced, lower-fat formulation, maximum 1 g fat per serving, pork or beef allowable as second meat, each slice to weigh 1 oz; no binders, extenders, fillers; CN label required, equivalent brands: Rain 956, Sunny 459</p>	<p>12-lb bulk</p>	<p>Pound</p>			
<p>Cheese, mozzarella, lite</p>	<p>Milk fat 10.85 or less, moisture 52% to 60%, pleasing flavor, free-flowing natural white or light cream color, melts completely, shredded</p>	<p>6/5 lb</p>	<p>Case</p>			
<p>Chicken nuggets, breaded, frozen</p>	<p>Boneless chicken breast patty nugget, whole grain-rich breaded, chopped, and formed, breast meat 80-85%, maximum skin 5%, soy concentrate up to 10% when rehydrated in accord with Title CFR 210, maximum 6 nuggets, minimum 5 nuggets, fully cooked, maximum 17 g fat, minimum 12 g protein/serving, CN label required</p>	<p>Please specify portions</p>	<p>Case</p>			

EX-AM-PL-E ONLY

SPECIFICATIONS—page 4 of 4

Item Description	Product Specification	Pack Size	Bid Unit	Est Quantity	Unit Price	Comments
Meat/Meat Alternate Chicken, boneless, canned	With natural juices, to be prepared from mature, whole, female chicken, maximum salt 0.7%, maximum fat 10%, 24-19 oz cans only	24/case	2/case			
Ham, water added	Fully cooked, boneless, ham and water product, maximum 35% added ingredients by weight, produced from whole muscle, smoked and cured	8/10 lb each	2/case			
Hot dogs, frozen	Frankfurters, frozen, to be packed to IMPS 800; no binders, extenders, or fillers; CN label required, formula B, 8/lb	81 per pound	101/box			
Roast beef, cooked, frozen	Cooked, ready to serve, frozen, may be injected with up to 35% water, wet pack, seasoned, cooked to internal temperature of 136° to 140° F, shrink wrap, maximum 20#, equivalent brands: A7656, 4530 Raw, frozen, whole-hog sausage, 1 1/2 oz each	Pounds per case	Case			
Sausage patties	Boneless, ready to cook, from natural whole muscle, maximum 6% basting solution added, from U.S. Grade A, young turkey, 7-15 lb	12/plg	Pound			
Turkey, breast, frozen		4/case	Case			

EXAMPLE ONLY

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SPECIFICATIONS

Item Description	Product Specification	Pack Size	Bid Unit	Est Quantity	Unit Price	Comments

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ESCALATION/DEESCALATION CLAUSE

- A. SFAs need to contemplate not only the need for including an economic price adjustment clause (an escalator/deescalator clause) in their contracts, but also to carefully enforce the terms of the clause and demand price reductions when appropriate.
- B. A contract with an economic price adjustment is appropriate when:
 - 1. Contract performance will or may cover an extended period of time.
 - 2. There is serious doubt concerning the stability of market conditions during the period of the contract.
 - 3. Adjustment standards or indices agreed to are based on contingencies outside the contractor's control.
 - 4. Contingencies, such as increases in labor costs, that would otherwise be included in the contract price can be identified and covered separately in the contract.
- C. The economic price adjustments, which allow an SFA to adjust costs in the contract, must be tied to an appropriate standard or cost index. Relating the price adjustments in a contract to an index allows the SFA to ensure that increases under the contract are not without basis. For example, if fuel prices are increasing drastically, then an appropriate index—such as the Consumer Price Index (CPI)—will reflect this change.
- D. It is recommended that the escalation/deescalation clause be tied to the *Consumer Price Index, South Region* and be stated as such in the RFP/Contract. SFAs may then check the Web site at <<http://www.bls.gov/ro3/cpiso.html>> to ensure prices are adjusted accordingly.
- E. As always, the terms of the economic price adjustment, including the appropriate standards or indices to which it will be tied, must be expressly identified in the original solicitation and contract documents. Additionally, as under any circumstances, the contract must be awarded to the lowest-priced, responsible, and responsive bidder.
- F. However, it is important to note that the SFA needs to decide whether it would like to include these in its contract; it is not the vendor's decision. Along the same lines, it is important to recognize that the SFA will most likely be advised by the contractor when costs go up, but they will not necessarily notify the SFA when costs go down. Keep in mind that the economic price adjustment clause is intended not only to give vendors an option to increase their price for the SFA, *but also* for the SFA to demand price reductions when appropriate. (Reference USDA Memo Code 2009-SP-10)
- G. Escalation/Deescalation Clause

If the fixed cost (market price) fluctuates, every 30 days the fixed cost will increase or decrease by the same amount. This must be stated in the SFA's RFP/ITB/Contract.
- H. Audits

A quarterly audit is conducted by the state to ensure that the charges by the vendor are not more than the fixed cost.

I. Special Brands

1. Special brands could be available if there is a minimum mandate for the product.
2. The vendor will try to provide a like brand.

J. Rebates/Manufacturer Discount

1. If 25 percent of the products purchased are the vendor's brand, the SFA will receive a 1 percent rebate on the 25 percent of purchased products.
2. If the vendor receives an up-front manufacturer discount, the discount is automatically applied to the product before the product is priced for purchase. The invoice to the SFA is going to reflect the discount. The SFA may not be aware of the discounted price.

PURCHASING THROUGH STATE CONTRACT

- A. The contract between the vendor and the state of Oklahoma is for one year, with an option to renew every year for four additional years. Because the contract is with the state of Oklahoma (Office of Central Purchasing), no specifications by the SFA are required.
1. The contract is a fixed-cost (vendor cost) plus a fixed fee.
 2. The vendor prefers SFAs to begin at the start of the school year or at midyear.
 3. If an SFA is on the state contract and finds an item from another vendor that has a lower price, it may be purchased outside the state contract with written documentation.
 4. If an SFA is interested in state contracting, contact Central Purchasing at 405-717-2301 (Bob Johnson) or at <www.dcs.ok.gov>.

BUY AMERICAN PROVISION

Section 104(d) amended Section 12(n) of the National School Lunch Act (NSLA) (42 U.S.C. 1760) to require SFAs participating in the National School Lunch Program (NSLP) and School Breakfast Program (SBP) in the contiguous United States *to purchase for those programs, to the maximum extent practicable, domestic USDA Foods or products*. For purposes of this provision, the term *domestic food commodity or product* means agricultural USDA Foods produced in the United States and food products processed in the United States ***SUBSTANTIALLY*** using agricultural USDA Foods that are produced in the United States. The Conference Report accompanying Public Law 105-336 makes it clear that the term ***SUBSTANTIALLY*** means that over 51 percent of the processed food comes from American-produced products.

FARM-TO-SCHOOL

SFAs may purchase food from local farmers or farmer's markets. This is called farm-to-school. Section 4303 of the Farm Security and Rural Investment Act of 2002 adds a new paragraph (j) at the end of Section 9 of the Richard B. Russell National School Lunch Act pertaining to purchases of locally produced products. The provision requires the Secretary of Agriculture to *encourage institutions participating in the NSLP and SBP to purchase locally produced foods to the maximum extent practicable*. USDA now allows a geographic preference when procuring unprocessed locally grown or locally raised agricultural products. Geographic preference may *ONLY* be applied to the procurement of unprocessed agricultural products which are locally grown and locally raised and that have not been cooked, seasoned, frozen, canned, or combined with any other products. (Reference USDA Policy Memo SP-30-2008)

A. Inspections and Licensing

1. Donated/Purchased Produce From an Individual Farmer

The Oklahoma State Department of Health does *NOT* require any type of inspection or licensing as long as the food items are purchased or donated directly from *an individual farmer* and are whole and intact (not processed). If purchased, federal procurement procedures must be followed. In addition, the food item purchased or donated must not be considered a *potentially hazardous food* as defined by Oklahoma State Department of Health Food Service Establishment Regulations, Chapter 257. *Potentially hazardous food* means a food that is natural or synthetic and requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms, the growth and toxic production of **Clostridium botulinum**, or, in raw shell eggs, the growth of **Salmonella enteritidis**. Potentially hazardous foods include, but are not limited to, animal foods (a food of animal origin) that is raw or heat-treated, a food of plant origin that is heat-treated or consists of raw seed sprouts, cut melons, and garlic and oil mixtures that are not modified in a way that results in mixtures that do not support growth. Potentially hazardous food does not include air-cooled hard-boiled eggs with the shell intact; a food with a water activity of 0.85 or less; a food with a pH level of 4.6 or below when measured at 75°F; a food in an unopened, hermetically sealed container; a food for which laboratory evidence demonstrates that the rapid and progressive growth of infectious or toxigenic microorganisms or the growth of **S. enteritidis** or **C. botulinum** cannot occur; or a food that may contain infectious or toxigenic microorganisms or chemical or physical contaminants at a level sufficient to cause illness, but that does not support the rapid and progressive growth of infectious or toxigenic microorganisms.

2. Donated/Purchased Meat/Poultry Products From an Individual Farmer

If a meat/poultry product is donated by a local farmer or purchased from a local farmer, the school must make sure the product was inspected either at a state or federal plant. If purchased, federal procurement procedures must be followed.

3. Purchasing Food From a Farmer's Market

According to the Oklahoma State Department of Health, *farmer's market* means a designated area in which farmers, growers, or producers from a defined region gather on a regularly scheduled basis to sell at retail nonpotentially hazardous farm food products and whole shell eggs to the public. A portion of the raw food ingredients used by the individual vendor to produce a product must have been grown or raised by the vendor. The individual vendors wishing to process food as defined by Chapter 260 of the regulations must obtain a state food processor's license. Farmer's markets must be registered with the Oklahoma Department of Agriculture Food and Forestry and comply with the *Food Service Establishment Regulations*, Chapter 257, and/or *Good Manufacturing Practice*, Chapter 260. This definition does not include individual farmers who grow and sell unprocessed fruit and/or vegetables from the farm, roadside, or truck. *Any vendors who prepare or sell any potentially hazardous foods at the farmer's markets must abide by all applicable sections of Chapter 257 of the regulations, including acquiring a license from the department.*

4. Herbicides and Pesticides

The Oklahoma State Department of Health recommends that SFAs obtain a guarantee from farmers that the crops/food items purchased from the local farmer were grown with herbicides and pesticides free of any carcinogens. This is not a regulatory requirement.

B. Farm-to-School Procurement Steps

1. Using the *The Oklahoma Food Connection 2003* developed by the Oklahoma Food Policy Council/Kerr Center for Sustainable Agriculture as a reference, contact a few farmers to inquire about the availability of specific product items for use in your CNP.
2. Request from each farmer a list of produce grown, showing typical periods of availability during the school year. Many crops normally harvested in the spring and summer months can also be grown in Oklahoma for harvest in the fall and early winter. Just ask the farmers to indicate which produce could be available during the periods August—December, December—March, March—May, and also May—August if you have summer feeding programs.
3. Upon reviewing the lists of available produce, estimate the approximate volumes used weekly for each item in which you are interested.
4. Arrange appointments to meet with farmers to gather information about possible quantities available, grading, packaging, delivery, pricing, and payment. If the SFAs anticipated annual purchase of a particular product will be less than the applicable small purchase threshold, the SFA can use these simplified procedures and contact a number of local farmers. The federal small purchase threshold is currently set at \$150,000.

To facilitate purchase of locally grown produce, SFAs can: identify and encourage local farmers to submit price quotes; look into alternative pack sizes and distribution methods that reflect product availability, using pricing structures such as fixed delivery charges with product prices that respond to the current market value; and explore new and different products that are available through local farms.

SFAs also need to develop specifications that reflect the characteristics of the products they seek. For example, local farmers grow a specific lettuce variety that students prefer but that the SFA cannot get through its broker or distributor. The SFA can write its specification requiring this lettuce variety. However, just writing the specification alone will not be adequate to ensure local farm participation. The SFA must have *laid the groundwork*; i.e., identifying and encouraging local farm participation for the procurement to be successful.

Use this information to help create appropriate product specifications. *Quality Foods for Quality Meals* from USDA's Fruits and Vegetables Galore provides product sheets for fruits and vegetables that may be used to develop specifications. To ensure the freshest product possible, consider using a statement such as *days from harvest* in your product specifications.

5. Obtain and document price quotes for produce items as you specify in order to get the freshest product at the best price.
6. Forward Contract:

A forward contract is generally understood to involve a contract between two parties to buy or sell products at a specified time in the future at a price agreed upon today. Entering into a forward contract with local producers in advance of the season may pose risk as farmers may experience crop loss due to outside elements such as weather or infestation. An SFA/institution/sponsor is the steward of the nonprofit school food service account and must ensure that all costs are reasonable, necessary, and allocable. Thus, careful consideration must be given to such contracts and the potential risk weighed against the benefit. Additionally, the entity needs to ensure that the farmer is capable of providing substitutions that are meaningful in the event of crop failure and to incorporate language into the contract affording meaningful substitutions or a return on the original financial investment. (Reference USDA Memo SP-03-2013)

NONKICKBACK AFFIDAVIT

Located on **page P-41** is a sample Nonkickback Affidavit Form that should be used for purchases. Please note that Oklahoma statute 62 O.S. §310.9 requires a signed and notarized nonkickback affidavit on every purchase order of \$25,000 or more. The affidavit is to be signed by the person or persons authorized to accept payment on behalf of the architect, contractor, engineer, or supplier.

LOBBYING CERTIFICATION (Reference 7 CFR §3018)

- A. Lobbying certification must be obtained for procurement contracts of more than \$150,000. Any vendor whose contract award is for more than \$150,000 must complete a Certification Regarding Lobbying form located on **page P-45**. The SFA must keep this signed certification statement on file with a copy of the vendor's contract.
- B. Any SFA or its vendors who participate in lobbying activities must complete a Disclosure of Lobbying Activities form on **page P-47**. SFAs must submit this completed form to the State Agency. A vendor would submit its completed form to the SFA.

DEBARMENT OR SUSPENSION (Reference 7 CFR §3017.300)

- A. An SFA is prohibited from contracting with an individual or company that has been debarred or suspended in accordance with 2 CFR § 180, as adopted and modified by USDA regulations at 2 CFR §417. This prohibition does not extend to contracts in existence at the time of the debarment or suspension or to most contracts under \$25,000. Rather, it applies to new contracts and extensions or renewals of existing contracts of \$25,000 or more and to contracts for audit services, regardless of amount.
- B. To ensure that an SFA does not enter into a contract with a debarred or suspended company or individual, each SFA 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. New rules provide greater flexibility in meeting requirements. An SFA may meet the requirements by either of the two methods listed below:
 - 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, an SFA may use the State Agency prototype on **page P-49**.

BEVERAGES AND SNACK AGREEMENTS (Reference USDA Policy Memo 99-SP-09)

- A. Several questions have been raised regarding exclusive beverage and snack contracts. The following is a summary of existing regulatory requirements as they pertain to these contracts.
 - 1. In some cases, the exclusive contracts do not involve nonprofit school food service account (SFSA) funds, in which case there are no federal FNS procurement issues involved. However, if any nonprofit school food service products are purchased via the exclusive contract, then all federal procurement requirements must be met. If small purchase procedures are used for a procurement of \$150,000 or less, price or rate quotations must be obtained from an adequate number of qualified sources.

2. Additionally, if nonprofit school food service products are included in the contract, any rebates, commissions, scholarship fund contributions, or any other payments back to the SFA or SFA-related organizations must be reimbursed to the nonprofit SFSA on a prorated basis.
3. Finally, since many of these contracts are multiyear, it should be noted that there is no federal prohibition on multiyear contracts other than for FSMCs. It is suggested, however, that school procurement officials consider the impact of multiyear contracts, as opposed to one-year contracts, on beverages and snacks. Long-term contracts would appear to be more appropriate for nonperishable products and services such as warehousing and equipment rental. As noted above, however, there is no federal prohibition on these longer-term contracts.
4. Public Law 108-265, Section 102, requires a school participating in the NSLP shall not directly or indirectly restrict the sale or marketing of fluid milk products by the school (or by a person approved by the school) at any time or any place on the school premises or at any school-sponsored event.
5. Schools participating in the NSLP must check all beverage contracts for language that may limit the sale of milk on school grounds. The sale of milk cannot be limited at any time during the school day or at any place on the school premises. Contracts may have language that is hard to understand. Look for the term ***Exclusive Pouring Rights***. Every school district must have amended their beverage contracts that limit the sale of milk should such language exist. Beverage contracts can sometimes have a duration of ten years. Because some are so long, it could be several years before one is rebid. That is why it is very important to check all contracts ***NOW*** and make amendments when necessary. The primary effect of this provision is to prevent contract limitations on the sale of fluid milk in competition with other beverages.

PROCUREMENT STANDARDS (Reference 7 CFR §3016.36)

- A. SFAs will use their own procurement procedures which reflect applicable state and local laws and regulations, provided that the procurements conform to applicable federal law and the standards.
 1. SFAs will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
 2. SFAs will maintain a written code of standards of conduct governing the performance of their employees engaged in the awarding and administration of contracts. No employee, officer, or agent of the SFA shall participate in the selection, awarding, or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: the employee, officer, or agent; any member of his or her immediate family; his or her partner; or any organization which employs or is about to employ any of the above, has a financial or other interest in the firm selected for the award. The SFA's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. SFAs may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by state or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the SFA's officers, employees, or agents or by contractors or their agents. The awarding agency may (in regulations) provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

3. SFA procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach.
4. To foster greater economy and efficiency, SFAs are encouraged to enter into state and local intergovernmental agreements for procurement or use of common goods and services.
5. SFAs are encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
6. SFAs are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.
7. SFAs will make awards 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.
8. ***Adequate documentation to maintain.*** SFAs will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to, the following:
 - a. Rationale for the method of procurement.
 - b. Selection of contract type.
 - c. Copies of advertisements for formal bids and requests for proposals.
 - d. Copy of procurement instruments, including instructions to offerors, specifications, and any addenda.
 - e. Dated list of potential contractors/vendors who were mailed or who picked up RFBs/ITBs.
 - f. Documentation of telephone quotations and copies of written quotations received from vendors.
 - g. Bids/proposals submitted by vendors/contractors with date-stamped bid envelope.
 - h. Bid/quotation/proposal evaluation sheets, including documentation whenever the lowest bid or quotation price is not accepted.
 - i. Copies of bid/proposal award letters and letters to unsuccessful offerors.
 - j. Copies of contracts.
 - k. Documentation of insurance, if required by bid/proposal.
 - l. Copies of bid and/or performance bonds, if required by bid/proposal.
 - m. Invoices must be signed and dated.

9. SFAs will use time-and-material-type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at his or her own risk.
10. SFAs alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the SFA of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the SFA unless the matter is primarily a federal concern. Violations of law will be referred to the local, state, or *federal* authority having proper jurisdiction.
11. **Protest procedures are required.** SFAs will have protest procedures (refer to **page P-51** for an example) to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the SFA before pursuing a protest with a federal agency. Reviews of protests by the federal agency will be limited to: (Reference USDA Policy Memo 2006-SNP-06)
 - a. Violations of federal law or regulations and the standards of 7 CFR §3016 (violations of state or local law will be under the jurisdiction of state or local authorities).

AND

- b. Violations of the SFA's protest procedures for failure to review a complaint or protest. Protests received by the federal agency other than those specified above will be referred to the SFA.
12. **Competition.** All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of 7 CFR §3016.36. Some of the situations considered to be restrictive of competition include, but are not limited to:
 - a. Placing unreasonable requirements on firms in order for them to qualify to do business.
 - b. Requiring unnecessary experience and excessive bonding.
 - c. Noncompetitive pricing practices between firms or between affiliated companies.
 - d. Noncompetitive awards to consultants that are on retainer contracts.
 - e. Organizational conflicts of interest.
 - f. Specifying only a **brand name** product instead of allowing **an equal** product to be offered and describing the performance of other relevant requirements of the procurement. This may be done as long as the SFA has documentation to support it.
 - g. Any arbitrary action in the procurement process.
13. SFAs will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in 7 CFR §3016 preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria, provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

CHILD NUTRITION PROGRAMS (CNP) PROCUREMENT SELF-REVIEW

Answer the following questions about your procurement practices. If the answer to any of the questions is *NO*, your procurement practices are *NOT* acceptable and must be revised.

YES	NO	I. PROCUREMENT PLAN
<input type="checkbox"/>	<input type="checkbox"/>	1. Is there a written procurement plan approved by the local school board on file?
<input type="checkbox"/>	<input type="checkbox"/>	2. Does the plan identify the school district's purchasing periods for the goods, equipment, and services related to the school food service program?
<input type="checkbox"/>	<input type="checkbox"/>	3. Does the plan document the various methods of procurement being practiced to obtain the goods, equipment, and services related to the school food service program?
<input type="checkbox"/>	<input type="checkbox"/>	4. Is there a written code of conduct that governs the performance of the school district's officers, employees, or agents who are engaged in the award and administration of contracts supported by school food service funds?
<input type="checkbox"/>	<input type="checkbox"/>	5. Does the written code contain all the required statements?
YES	NO	II. SMALL PURCHASE PROCEDURES
<input type="checkbox"/>	<input type="checkbox"/>	1. Are all goods, equipment, or services to be purchased adequately and consistently described for each prospective supplier so that each one can provide price quotes on the same merchandise or service?
<input type="checkbox"/>	<input type="checkbox"/>	2. Are an adequate number of qualified sources contacted to provide price quotes? <i>NOTE: The term adequate number is defined as three by USDA.</i>
<input type="checkbox"/>	<input type="checkbox"/>	3. Are all responses to <i>requests for quotations</i> documented?
<input type="checkbox"/>	<input type="checkbox"/>	4. Is cost-plus-a-percentage-of-cost method of purchasing prohibited?
<input type="checkbox"/>	<input type="checkbox"/>	5. Are all price quotation responses retained by the school district with other school food service program documentation and records for a period of three years after the end of the fiscal year to which they pertain?
YES	NO	III. SEALED BIDS (FORMAL ADVERTISING)
<input type="checkbox"/>	<input type="checkbox"/>	1. Is the Request for Proposal (RFP)/Invitation to Bid (ITB) publicly advertised?
<input type="checkbox"/>	<input type="checkbox"/>	2. Are bids solicited from an adequate number of known suppliers in sufficient time prior to the date set for the opening of the bids?
<input type="checkbox"/>	<input type="checkbox"/>	3. Do the bids clearly define the goods, equipment, or services needed in order for the bidders to be able to properly respond? This includes product specifications and general purchasing conditions.
<input type="checkbox"/>	<input type="checkbox"/>	4. Are all bids opened publicly at the time and place stated in the RFP or ITB?

CHILD NUTRITION PROGRAMS (CNP) PROCUREMENT SELF-REVIEW continued

YES

NO

5. Is a firm, fixed-price contract award made by written notice to the responsible bidder whose bid is lowest, assuming the bid conforms to the requirements in the RFP or ITB?

6. Where specified in the bidding documents, are factors such as discounts, transportation costs, and life-cycle costs (for equipment), if applicable, considered in determining which bid is lowest?

7. Are payment discounts used to determine the low bid when prior experience of the school district indicates that such discounts are generally taken?

8. Is there adequate explanation and documentation for each exception to awarding to the lowest bidder on file?

9. Is cost-plus-a-percentage-of-cost method of contracting prohibited?

10. Do contracts contain all required provisions (remedy, termination, and record access clauses, Equal Employment Opportunity [EEO], and Energy Policy and Conservation Act, for any formal bid; Clean Air and Clean Water Acts if bid is over \$150,000)?

11. When handling equally low bids, are acceptable guidelines used to determine the awards (e.g., small business, labor-surplus area, drawing by lot)?

12. Are all bids received documented, and is such documentation maintained by the school district with other school food service program records for three years after the end of the fiscal year to which they pertain?

YES

NO

IV. PROCUREMENT MANAGEMENT

1. Are invoice prices the same as the bid prices?

2. Are the products delivered the same as those listed on the bid?

3. Are the quantities ordered consistent with the quantities estimated in the bid?

4. Is the school system notified if a substitution has to be made?

5. Is there a system in place to ensure receipt of rebates?

6. Are rebates credited appropriately as stated in the RFP/contract?

7. Do managers adequately document problems with deliveries and/or product acceptability?

8. Does the SFA have protest procedures to handle any protest a district may receive concerning its procurement procedures?

9. Are all invoices signed and dated?

NONKICKBACK AFFIDAVIT FORM

STATE OF OKLAHOMA)
) SS
COUNTY OF)

The undersigned (architect, contractor, supplier, or engineer), of lawful age, being first duly sworn, on oath says that this contract (purchase order) is true and correct. Affiant further states that the (work, services, or materials) will be (completed or supplied) in accordance with the plans, specifications, orders, or requests furnished the affiant. Affiant further states that he or she has made no payment, directly or indirectly, to any elected official, officer, or employee of the SFA or technology center SFA, of money or any other thing of value to obtain or procure the contract or purchase order.

(Contractor, Supplier, Engineer, or Architect)

Vendor/Company Name

Attested to before me this _____ day of _____, _____.

Notary Public (or Clerk or Judge)

My Commission Expires: _____

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INDEPENDENT PRICE DETERMINATION CERTIFICATE

Name of Food Service Management Company

Name of School Food Authority

A. By submission of this offer, the Offerer certifies, and in the case of a joint offer, each party thereto certifies as to his or her own organization, that in connection with this procurement:

1. The prices in this offer have been arrived at independently, without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such prices with any other Offerer or with any competitor.
2. Unless otherwise required by law, the prices which have been quoted in this offer have not been knowingly disclosed by the Offerer and will not knowingly be disclosed by the Offerer prior to opening in the case of an advertised procurement or prior to award in the case of a negotiated procurement, directly or indirectly to any other Offerer for the purpose of restricting competition.
3. No attempt has been made or will be made by the Offerer to induce any person or firm to submit or not to submit an offer for the purpose of restricting competition.

B. Each person signing this offer on behalf of the Offerer certifies that:

1. He or she is the person in the Offerer's organization responsible within the organization for the decision as to the prices being offered herein and has not participated, and will not participate, in any action contrary to A.1 through A.3 above; or
2. He or she is not the person in other Offerer's organization responsible within the organization for the decision as to the prices being offered herein, but that he or she has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated and will not participate in any action contrary to A.1 through A.3 above, and as their agent does hereby so certify; and he or she has not participated, and will not participate, in any action contrary to A.1 through A.3 above.

To the best of my knowledge, this Offerer, its affiliates, subsidiaries, officers, directors, and employees are not currently under investigation by any government agency and have not in the last three years been convicted of or found liable for any act prohibited by state or federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract, except as follows:

Signature of Food Service Management Company's
Authorized Representative

Title

Date

In accepting this offer, the SFA certifies that no representative of the SFA has taken any action that may have jeopardized the independence of the offer referred to above.

Signature of School Food Authority's
Authorized Representative

Title

Date

NOTE: Accepting a bidder's/offerer's offer does not constitute award of the contract.

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CERTIFICATION REGARDING LOBBYING

Applicable to Grants, Subgrants, Cooperative Agreements, and Contracts Exceeding \$150,000 in Federal Funds

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 \$150,000 for each such failure.

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

1. No federally 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, or an employee of a Member of Congress 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 federally 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, or an employee of a Member of Congress 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 subawards exceeding \$150,000 in federal funds at all appropriate tiers and that all subrecipients shall certify and disclose accordingly.

Name/Address of Organization

Name/Title of Submitting Official

Signature

Date

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**DISCLOSURE OF LOBBYING ACTIVITIES
APPROVED BY OMB**

**COMPLETE THIS FORM TO DISCLOSE LOBBYING ACTIVITIES PURSUANT
TO 31 U.S.C. 1352**

(SEE REVERSE FOR PUBLIC DISCLOSURE)

<p>1. Type of Federal Action:</p> <p><input type="checkbox"/> a. Contract <input type="checkbox"/> b. Grant <input type="checkbox"/> c. Cooperative Agreement <input type="checkbox"/> d. Loan <input type="checkbox"/> e. Loan Guarantee <input type="checkbox"/> f. Loan Insurance</p>	<p>2. Status of Federal Action:</p> <p><input type="checkbox"/> a. Bid/Offer/Application <input type="checkbox"/> b. Initial Award <input type="checkbox"/> c. Postaward</p>	<p>3. Report Type:</p> <p><input type="checkbox"/> a. Initial Filing <input type="checkbox"/> b. Material Change For Material Change Only: Year _____ Quarter _____ Date of Last Report _____</p>
<p>4. Name and Address of Reporting Entity:</p> <p><input type="checkbox"/> Prime <input type="checkbox"/> Subawardee Tier _____, if known:</p> <p>Congressional District, if known:</p>	<p>5. If Reporting Entity in No. 4 Is Subawardee, Enter Name and Address of Prime:</p> <p>Congressional District, if known:</p>	
<p>6. Federal Department/Agency:</p>	<p>7. Federal Program Name/Description:</p> <p>CFDA Number, if applicable: _____</p>	
<p>8. Federal Action Number: <i>(if known)</i></p>	<p>9. Award Amount: <i>(if known)</i></p> <p>\$ _____</p>	
<p>10. a. Name and Address of Lobbying Entity: <i>(if individual, last name, first name, MI)</i></p>	<p>b. Individual Performing Services: <i>(including address if different from No. 10a) (last name, first name, MI)</i></p>	
<p>11. Amount of Payment: <i>(check all that apply)</i></p> <p>\$ _____</p> <p>Actual <input type="checkbox"/> Planned <input type="checkbox"/></p>	<p>13. Type of Payment: <i>(check all that apply)</i></p> <p><input type="checkbox"/> a. Retainer <input type="checkbox"/> b. One-Time Fee <input type="checkbox"/> c. Commission <input type="checkbox"/> d. Contingency Fee <input type="checkbox"/> e. Deferred <input type="checkbox"/> f. Other: <i>(specify)</i> _____</p>	
<p>12. Form of Payment: <i>(check all that apply)</i></p> <p>a. Cash Nature _____ b. In-kind (specify) Value _____</p>		
<p>14. Brief Description of services performed or to be performed and date(s) of service, including officer(s), employee(s), or member(s) contracted for payment indicated in Item 11:</p> <p align="center"><small>(Attach Continuation Sheets if necessary)</small></p>		
<p>15. Continuation Sheets Attached: Yes <input type="checkbox"/> No <input type="checkbox"/></p>		
<p>16. Information requested through this form is authorized by Title 31 U.S.C. §1352. This disclosure of lobbying activities is a material representation of fact upon which evidence was placed by the above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. §1352. This information will be reported to the Congress semiannually and will be available for public inspection. Any person who fails to file the required disclosures shall be subject to a civil penalty of not less than \$10,000 and not more than \$150,000 for each such failure.</p>	<p>Signature: _____ Print Name: _____ Title: _____ Telephone Number: _____ Date: _____</p>	
<p>Federal Use Only: _____ Authorized for Local Reproduction</p>		

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime federal recipient, at the initiation or receipt of a covered federal action or a material change to a previous filing, pursuant to Title 31 U.S.C. §1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered federal action. Use a Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget (OMB) for additional information.

1. Identify the type of covered federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered federal action.
2. Identify the status of the covered federal action.
3. Identify the appropriate classification of this report. If this is a follow-up report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered federal action.
4. Enter the full name, address, city, state, and zip code of the reporting entity. Include Congressional district, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee; e.g., the first subawardee of the prime is the first tier. Subawards include, but are not limited to, subcontracts, subgrants, and contract awards under grants.
5. If the organization filing the report in Item 4 checks *Subawardee*, then enter the full name, address, city, state, and zip code of the prime federal recipient. Include Congressional District, if known.
6. Enter the name of the federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example: Department of Transportation, United States Coast Guard.
7. Enter the federal program name or description for the covered federal action (Item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate federal identifying number available for the federal action identified in Item 1; e.g., Request for Proposal (RFP) number; Invitation to Bid (ITB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the federal agency. Include prefixes; e.g., *RFP-DE-90-001*.
9. For a covered federal action where there has been an award or loan commitment by the federal agency, enter the federal amount of the award/loan commitment for the prime entity identified in Item 4 or Item 5.
10.
 - a. Enter the full name, address, city, state, and zip code of the lobbying entity engaged by the reporting entity identified in Item 4 to influence the covered federal action.
 - b. Enter the full name of the individual performing services, and include full address if different from 10a. Enter last name, first name, and middle initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (Item 4) to the lobbying entity (Item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate item. Check all items that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box. Check all boxes that apply. If *Other*, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the dates of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with federal officials. Identify the federal officials or employees contacted or the officers, employees, or Members of Congress that were contacted.
15. Check whether Continuation Sheets are attached.
16. The certifying official shall sign and date the form, print his or her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

CERTIFICATION REGARDING DEBARMENT/SUSPENSION

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION—LOWER-TIER COVERED TRANSACTIONS

This certification is required by the regulations implementing Executive Order 12549 and 12689, Debarment and Suspension, Title 2 CFR, §180, as adopted and modified by USDA regulation at 2 CFR §417, Responsibilities of Participants Regarding Transactions.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE.)

1. The prospective lower-tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

2. Where the prospective lower-tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization/Vendor Name

Name(s) and Title(s) of Authorized Representative(s)

Name of Institution/SFA Official

Title of Official

Signature

Date

INSTRUCTIONS FOR CERTIFICATION REGARDING DEBARMENT/SUSPENSION

1. By signing and submitting this form, the prospective lower-tier participant is providing the certification set out on the reverse side in accordance with these instructions.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower-tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower-tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower-tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms *covered transaction, debarred, suspended, ineligible, lower-tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower-tier participant agrees by submitting this form that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower-tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which the transaction originated.
6. The prospective lower-tier participant further agrees by submitting this form that it will include this clause titled *Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower-Tier Covered Transactions*, without modification, in all lower-tier covered transactions and in all solicitations for lower-tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower-tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith that certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower-tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

**EXAMPLE
PROTEST PROCEDURES**

- A. Any actual or prospective bidder, offeror, or contractor who considers himself to have been aggrieved in connection with the solicitation, evaluation, or award of a contract by _____ (School District) may formally protest to the _____ (Responsible Person) of _____ (School District). Such protests must be made in writing and received by the _____ (Responsible Person) of _____ (School District). The protesting party must mail or deliver copies of the protest to the _____ (School District), the State Agency, and other interested parties.
- B. In the event of a timely protest, the _____ (School District) shall not proceed further with the solicitation or award of the contract.
- C. A formal protest must be sworn and contain:
1. A specific identification of the statutory or regulatory provision that the protesting party alleges has been violated.
 2. A specific description of each action by _____ (School District) that the protesting party alleges to be a violation of the statutory or regulatory provision that the protesting party has identified.
 3. A precise statement of the relevant facts.
 4. A statement of any issues of law or fact that the protesting party contends must be resolved.
 5. A statement of the argument and authorities that the protesting party offers in support of the protest.
 6. A statement that copies of the protest have been mailed or delivered to the State Agency and all other identifiable interested parties.
- D. The _____ (School District) may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal. The _____ (School District) may solicit written responses to the protest from other interested parties.
- E. If the protest is not resolved by mutual agreement, the _____ (School District) shall issue a written determination that resolves the protest.
1. If the _____ (School District) determines that no violation of statutory or regulatory provisions has occurred, then the _____ (School District) shall inform the protesting party, the State Agency, and other interested parties by letter that sets forth the reasons for the determination.
 2. If the _____ (School District) determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has not been awarded, then the _____ (School District) shall inform the protesting party, the State Agency, and other interested parties of that determination by letter that details the reasons for the determination and the appropriate remedy.
 3. If the _____ (School District) determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has been awarded, then the _____ (School District) shall inform the protesting party, the State Agency, and other interested parties of that determination by letter that details the reasons for the determination. This letter may include an order that declares the contract void.
- F. The _____ (School District) shall maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the retention schedule of _____ (School District).

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FOOD SERVICE MANAGEMENT COMPANY (FSMC)

An SFA may contract with an FSMC to manage its feeding operation. However, contracting with an FSMC *does not* relieve the site's accountability for the operation of the CNP under its administration. Under no circumstances shall the FSMC write the actual contract RFP or ITB or set up the evaluation criteria for the bid award. (Reference USDA Regulation §210.16, §3016.36[b], and USDA Policy Memo 2006-SNP-09)

A. FSMC versus Consultant or Vendor

USDA Regulation 7 CFR §210.2 defines an *FSMC* for the NSLP as a commercial enterprise or nonprofit organization that is or may be contracted with to *MANAGE* (emphasis added) the school food service day-to-day operations. FNS states that "An individual or organization that performs specific, discreet services for an SFA that fall short of managing the program would be a consultant (or vendor)." A consultant will always perform a district function or functions for the SFA, but will not manage the day-to-day operations.

B. RFP/ITB

1. An SFA desiring to contract its food service *MUST* contact the State Agency at 405-521-3327 to obtain a copy of the Oklahoma prototype RFP/ITB/Contract. The Oklahoma prototype *MUST* be used. The prototype RFP/ITB/Contract must be submitted for approval once it is completed. It is suggested that this be done at least 60 days prior to advertising the bid so that necessary changes can be made. Once the State Agency has approved the completed RFP/ITB/Contract prototype, it will be mailed back to the SFA so the bidding process may begin.
2. SFAs are to develop detailed specifications for each food component to be included in its RFP/ITB/Contract. Specifications shall cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.
3. Soliciting/advertising the bid:
 - a. Time allowed—Once the RFP is approved by the state, it is suggested that at least 60 days be allowed from the time bids/proposals are solicited to the time that they are due.
 - b. Advertising methods—Bids/proposals must be solicited directly from an adequate number of qualified FSMCs and must be publicized in order to provide for maximum open and free competition. To accomplish this, copies of the complete RFP should be mailed to prospective offerors. A list of these companies begins on **page P-64**.

Any amendments or changes to the RFP as well as any questions and answers resulting from written offeror inquiries or from a prebid/preproposal meeting must be approved by the State Agency and be submitted to all prospective offerors. No information regarding the RFP should be considered official or binding on the SFA until and unless it is provided in writing and has had prior approval by the State Agency.

Publicizing of the RFP should 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 RFP be publicized. At a minimum, however, the advertisement should include:

- The RFP number and date.
- A brief description of what is being proposed for procurement.
- Instructions for obtaining a copy of the RFP.

- c. Prebid/preproposal meeting—It is recommended that the SFA conduct a prebid/preproposal meeting. It should be held approximately two weeks after the RFP is issued, but prior to the date bids/offers are due. There are two important reasons for holding a prebid/preproposal 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.

4. Bid/Proposal Openings and Evaluations

It is imperative that bid/proposal openings and evaluations be conducted fairly. Inconsistent actions by the individuals responsible for this component of the FSMC procurement can result in bid protests or legal action.

- a. Proposal evaluation plan—Proposals should be thoroughly reviewed and subjected to an impartial evaluation. An evaluation plan should be prepared 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 the evaluation 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 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.
 - **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 or congregate feeding, 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.

- b. Proposal opening and evaluation—Proposals should 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. The bid opening requires a sign-in sheet to document the persons present at the bid opening.

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 the offeror's alternatives 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 preestablished 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. 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 preestablished 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 individuals 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.

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 to the State Agency. This notice should also inform the successful offeror that if nonsubstantive changes are needed as a result of the State Agency review, an opportunity will be provided to amend the proposal.

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.

- c. Analysis of price—The contract documents should clearly indicate factors to be considered in determining the price.
 - (1) Prompt payment discounts: Prompt payment discounts may only be included in the price determination when prior experience of the SFA indicates that such discounts are generally taken.
 - (2) Volume discounts: Volume discounts can only be considered if there is a reasonable expectation that the SFA will be able to use the discounts.
 - (3) Financial incentives: Financial incentives that do not accrue to the nonprofit school food service account cannot be used to determine the price submitted.
 - (4) 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.
 - (5) Total cost: The total cost of the bid/proposal for the breakfast, lunch, à la carte meal service, and any other CNP meal service such as SFSP or the CACFP that is operated by the SFA and included in the bid/proposal request, must be used in determining the lowest offeror.

C. Securing a Contract

1. The SFA shall adhere to the procurement standards specified in USDA regulations when contracting with the FSMC.
2. It is recommended that a provision be included in the RFP/ITB and the contract stating that any silence, absence, or omission from the contract specifications concerning any point shall 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 are to be used.
3. SFAs shall ensure that any RFP/ITB indicates that nonperformance subjects the FSMC to specified sanctions in instances where the FSMC violates or breaches contract terms. The SFA shall indicate these sanctions in accordance with the procurement provisions.

D. The following required provisions are included in the Oklahoma RFP/ITB/Contract prototype:

1. The State Agency shall annually review each contract, including all amendments, between any SFA and FSMC to ensure compliance with all the provisions and standards set forth in applicable regulations. The Oklahoma prototype contract **MUST** be used. Contact the State Agency at 405-521-3327 to obtain a copy.
2. If an à la carte food service is operated, the FSMC agrees to offer free, reduced-price, and full-price reimbursable lunches and/or breakfasts and snacks, if applicable, to all eligible children.
3. The SFA shall ensure that the food service operation is in conformance with its agreement under the program.
4. The SFA shall monitor the food service operation through periodic on-site visits. This cannot be done by the FSMC if the FSMC is in charge of the meal-counting and -claiming system. (Reference 7 CFR §210.8[a][1] and FSMC Guidance, page 7-2)
5. The SFA shall retain control of the quality, extent, and general nature of its food service and all prices to be charged for meals (contract prices, student prices, and adult prices for **ALL** meals).
6. The SFA shall retain signature authority on the State Agency–SFA Agreement, Policy Statement for Free and Reduced-Price Meals, and claims. Approval of Applications for Free and Reduced-Price School Meals **may not** be delegated to an FSMC. The SFA must also be responsible for the overall verification process. However, when an automated system is being used for the reviewing of Applications for Free and Reduced-Price School Meals, there is no problem with allowing the FSMC staff to input data. The FSMC staff may also update rosters for approved free and reduced-price eligible students and disseminate this information to cafeteria managers or cashiers. An FSMC employee can manually grant temporary approval as long as the final determination as to temporary eligibility is made by the SFA staff. The FSMC staff may be involved in any of the staff work involved in follow-up contacts. Any correspondence would need to be signed by SFA staff.
7. The SFA shall retain title to all USDA Foods.
8. The SFA shall ensure that all federal USDA Foods received and made available to the FSMC accrue only to the benefit of the SFA's nonprofit CNP and are fully utilized therein. All refunds from processors must be retained by the SFA. The FSMC may not subcontract for further processing of USDA Foods.

9. For Cost Plus Fee Contracts: Allowable costs paid from the nonprofit school food service account must be net of all discounts, rebates, and applicable credits. (Reference Section 12[n] of the NSLA and §210.21[d])
 - a. 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 SFA.
 - b. The contractor must separately identify for each cost submitted for payment to the SFA 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.

- c. The contractor's determination of its allowable costs must be made in compliance with the applicable USDA and program regulations and OMB cost circulars.
- d. The contractor must identify the amount of each discount, rebate, and other applicable credit on bills and invoices presented to the SFA for payment and 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.
- e. 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.
- f. The contractor must maintain documentation of costs and discounts, rebates, and other applicable credits and must furnish such documentation upon request to the SFA, the State Agency, or USDA.

Prohibited Expenditures. No expenditures may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include these requirements, 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.

10. The SFA shall maintain applicable health certification and assure that all state and local regulations are being met by an FSMC preparing or serving meals at an SFA facility.
11. The SFA shall establish an advisory board composed of parents, teachers, and students to assist in menu planning.

12. The FSMC shall adhere to the 21–day cycle menu that was included in the RFP/ITB for the first 21 days of meal service. Changes thereafter may be made with the approval of the SFA.
13. The FSMC shall maintain such records as the SFA will need to support its claim for reimbursement under this part and shall, at a minimum, report claim information to the SFA promptly at the end of each month. Such records shall be made available to the SFA upon request and shall be retained in accordance with federal and state regulations. Federal regulations require records to be maintained for a period of at least three years after the submission of the final claim for reimbursement for the fiscal year or longer as required to resolve audit issues. (Reference 7 CFR §210.23[c]) All negotiated contracts, except those awarded by Small Purchase Procedures, shall include a provision to the effect that the grantee, federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audits, examination excerpts, and transcriptions.
14. The FSMC shall have state or local health certification for any facility outside the school in which it proposes to prepare meals, and the FSMC shall maintain this health certification for the duration of the contract. The FSMC must meet all applicable state and local health regulations in preparing and serving meals at the SFA facility.
15. The contract between the SFA and the FSMC shall be of a duration no longer than one year, and options for the yearly renewal of a contract may not exceed four additional one-year extensions.
16. Either party may cancel for cause with 60-day notification.
17. A provision must allow the USDA Foods (commodity) distribution agency access to the contract to ensure compliance with the requirements of 7 CFR §250. The contract should include a provision that the FSMC shall maintain accurate and complete records with respect to the receipt, use or disposition, storage, and inventory of USDA Foods. Failure by the FSMC to maintain records required under the contract shall be considered prima facie evidence of improper distribution or loss of USDA Foods. The contract should also include the statement that title to USDA Foods will remain with the SFA.
 - a. The FSMC must credit the SFA for the value of all USDA Foods received for use in the SFA’s meal service in the school year or fiscal year (including both entitlement and bonus foods). Donated Foods are considered **RECEIVED** when they arrive at the school kitchen, SFA, or FSMC storage facility in either raw form or processed end products. Such requirement includes crediting for the value of USDA Foods contained in processed end products if the FSMC’s contract requires it to:
 - (1) Procure processed end products on behalf of the SFA.
 - (2) Act as an intermediary in passing USDA Foods value in processed end products on to the SFA.

The FSMC will ensure compliance with the requirements in Subpart C of 7 CFR Part 250 and with the provisions of DHS or SFA processing agreements and will ensure crediting of the SFA for the value of USDA Foods contained in such end products at the processing agreement value.
 - b. The SFA may permit crediting for the value of USDA Foods through invoice reductions, refunds, discounts, or other means. However, all forms of crediting must provide clear documentation of the value received from USDA Foods; e.g., by separate line item entries on invoices.

- (1) For a fixed-price contract, the SFA may permit an FSMC to precredit for USDA Foods. In precrediting, a deduction for the value of USDA Foods is included in the established fixed price per meal. However, the SFA must ensure that the FSMC provides an additional credit for any USDA Foods not accounted for in the fixed price per meal; e.g., for USDA Foods that are not made available until later in the year.
- (2) For a cost-reimbursable contract, crediting may be performed by disclosure; i.e., the FSMC credits the SFA for the value of USDA Foods by disclosing, in its billing for food costs submitted to the SFA, the savings resulting from the receipt of USDA Foods for the billing period.

In both types of contracts, the SFA must require crediting to be performed not less frequently than annually and must ensure that the specified method of valuation of USDA Foods permits crediting to be achieved in the required time period. The SFA 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. The SFA must ensure that, in crediting it for the value of USDA Foods, the FSMC uses the USDA Foods values determined by DHS in accordance with §250.58(e)—The USDA commodity file cost as of a date specified by DHS. Negotiation of such values is not permitted. Additionally, the method of valuation must ensure that crediting may be achieved in accordance with Item b on the previous page and at the specific frequency established.
- d. The FSMC must use all donated ground beef, donated 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 United States origin and of equal or better quality than USDA Foods in the SFA's food service (unless the contract specifically stipulates that USDA Foods, and not such commercial substitutes, be used).
- e. The FSMC will not itself enter into the processing agreement with the processor required in Subpart C of 7 CFR Part 250.50.
- f. The FSMC will comply with the storage and inventory requirements for USDA Foods.
- g. DHS, a subdistributing agency, or the SFA, the Comptroller General, USDA, or their duly authorized representatives may perform on-site reviews of the FSMC's food service operation, including the review of records, to ensure compliance with requirements for the management and use of USDA Foods.
- h. The FSMC will maintain records to document its compliance with requirements relating to USDA Foods in accordance with §250.54(b) as follows:
 - (1) The SFA must maintain the following records relating to the use of USDA Foods in its contract with the FSMC:
 - (a) USDA Foods and processed end products received and provided to the FSMC for use in the SFA's food service.
 - (b) Documentation 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 or fiscal year, including, in accordance with the requirements in §250.51(a), the value of USDA Foods contained in processed end products.

- (c) The actual USDA Foods values used in crediting.
- (2) The FSMC must maintain the following records relating to the use of USDA Foods in its contract with the SFA:
 - (a) USDA Foods and processed end products received from, or on behalf of, the SFA for use in the SFA's food service.
 - (b) Documentation that it has credited the SFA for the value of all USDA Foods received for use in the SFA's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of USDA Foods contained in processed end products.
 - (c) Documentation of its procurement of processed end products on behalf of the SFA if applicable.
- (3) The SFA must ensure that the FSMC is in compliance with the requirements of 7 CFR Part 250 through its monitoring of the food service operation, as required in 7 CFR Parts 210, 225, or 226, as applicable. The SFA must also conduct 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 or fiscal year, including, in accordance with the requirements in §250.51(a), the value of USDA Foods contained in processed end products.
- (4) USDA may conduct reviews of FSMC operations, as necessary, to ensure compliance with the requirements of 7 CFR Part 250 with respect to the use and management of USDA Foods.
 - i. Extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to USDA Foods.
 - j. For cost-reimbursable contracts only: The FSMC will ensure that its system of inventory management will not result in the SFA being charged for USDA Foods.
- 18. The contract must contain certification regarding debarment or suspension from participating in federal contracts, grants, or awards. The lobbying certification must also be included.
- 19. The FSMC and the SFA will comply with all appropriate federal and state labor laws.
- 20. Contracts, other than small purchases under \$150,000, shall contain provisions or conditions that allow for administrative, contractual, or legal remedies in instances where contracts violate or breach contract terms and provide for sanctions and penalties as may be appropriate.
- 21. All contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee, including the manner by which it will be effected and the basis for settlement. Such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated due to circumstances beyond the control of the contractor. (Reference 7 CFR §3016.36[i])

22. Contracts in excess of \$150,000 shall contain a provision requiring compliance with Executive Order 11246, entitled *Equal Employment Opportunity*, as amended by Executive Order 11375, in Department of Labor regulations (41 CFR §60).
23. Contracts in excess of \$150,000 shall contain provisions that require compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857[h]), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency (EPA) Regulation (40 CFR §15), which prohibit the use of nonexempt federal contracts, grants, or loans of facilities included on the EPA list of violating facilities. The provision shall require reporting of violations to the grantor agency and to the EPA Assistant Administrator for Enforcement (EN-329).
24. The contract must recognize mandatory standards and policies relating to energy efficiency that are contained in the State Agency conservation plan issued in compliance with the Energy Policy and Conservation Act (Public Law 94-163).
25. The contract must contain a provision regarding liability for the distribution, loss of, or damage to USDA Foods caused by fault or negligence, as well as the right of the SFA to assert claims against other persons to whom USDA Foods are delivered for care, handling, or distribution.
26. If the contract is expected to exceed \$2,500, the FSMC must agree to comply with Section 103 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR §5). Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard workday of eight hours and a standard workweek of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or 40 hours in the workweek.
27. The basis for renewing the contract, including price/fee increase or decrease provisions, if any, must be stated in the contract and the RFP/ITB as appropriate. Price/fee increase or decrease provisions should be based on a measurable index such as the food-away-from-home series of the CPI.
28. The inclusion of a provision requiring compliance with the Civil Rights Act of 1964, as amended, is encouraged. While the responsibility for compliance with the Act is an SFA responsibility, this provision is intended to ensure that the food service operation conducted by the FSMC does not compromise SFA compliance with the Act.
29. It is further recommended that a provision be included regarding compliance with *Buy American* provisions for contracts that involve the purchase of food by the FSMC. While compliance with *Buy American* provisions is an SFA responsibility, inclusion of this provision in the contract is intended to ensure that the FSMC's operations do not compromise SFA compliance.
30. Meal equivalent rates for conversion of à la carte, milk, and snack bar sales should reflect the cost of the meal plus the value of USDA Foods. In the absence of actual cost data, the meal equivalent rate should be set at the federal free lunch reimbursement rate plus the state reimbursement rates plus the per-meal value of USDA Foods. Any meal equivalent rate less than the cost of meals plus the value of USDA Foods would act as a disincentive to serving reimbursable meals. Likewise, higher management or service fees for meal equivalents than for reimbursable meals will serve as a disincentive to serving reimbursable meals. The meal equivalent rate must be stated in the RFP/ITB and contract.

31. Requirements for excessive liability insurance for non-FSMC-approved vendors are unwarranted and restrict competition. Requirements that the insurance certification survive the termination of the contracts are beyond the scope of the agreement. These requirements could be used to limit open and free competition by serving as a barrier to entry into the public bidding process for smaller and newly created businesses. All procurement transactions must be conducted in a manner that provides maximum open and free competition.
32. Acceleration clauses requiring the payment in full of expenses for amortized equipment or other costs are not allowed in that these would violate the one-year restriction on contracts. States may go beyond this requirement to further restrict cost amortization. Contracts which provide for the payment of interest by the SFA are unallowable.
33. Any provisions that require the CNP account to pay the FSMC for damages for any FSMC employees hired by the district are prohibited due to restrictions on indemnification.
34. It is suggested that any waiver of liability by the SFA of damages by the FSMC to equipment or facilities should contain an exclusion to this waiver for any damages caused due to negligence.
35. There may be no time limitation on notification of the FSMC by the SFA of any meals that do not meet specifications, are unwholesome at the time of delivery, or do not otherwise meet the requirements of the contract. In the event of an audit or a state or federal review, overclaims may be assessed for previous claim periods in which meals do not meet requirements. A time limitation on notification would leave the SFA liable for such overclaims without recourse.
36. Any charges for fringe benefits for employees must be the actual cost of the specific fringe benefits rather than a percentage of salaries. The percentage of salaries is essentially a cost-plus-percentage-of-cost. The FSMC must provide the SFA with documentation of a cost allocation plan for any allocated costs reflecting actual costs and methods of allocation.
37. Lobbying Certification (7 CFR §3018).
38. Suspension and Debarment (7 CFR §3017).
39. Noncollusion (not required, but recommended).
40. Meal equivalency rate.
41. Food specifications.
42. Specific statement of scope of service to be provided, listing the programs to be operated; e.g., NSLP, SBP, Special Milk Program (SMP), After-School Snack Program (ASSP), catering, vending, concession, Child and Adult Care Food Program (CACFP), Summer Food Service Program for Children (SFSP), etc.
43. Basis for fee increase, salary increase, and bonuses.

The RFP/ITB/Contract must show where competitive proposals are solicited for a specific basis for fee increases, salary increases, or bonuses; or if using a CPI, the RFP/ITB must include the specific CPI, such as Food Away From Home, Price Index of Food Used in Sites and Institutions, All Urban Consumers, etc.; or if another index is used, the RFP/ITB/Contract must specify which index.

44. When an RFP is used, weighted evaluation factors must be developed by the SFA. (Reference 7 CFR §3016)
45. Procurement procedures to be followed.
46. Initial 21-day menu cycle.
47. Duration of contract.
48. For fixed-price FSMCs/Contracts, the FSMC must break down each invoice as follows:

• Student meals—both breakfast and lunch	Project Reporting Code 763, 764, 385, 000	Function Code 3150	Object Code 570
• Adult meals—both breakfast and lunch	Project Reporting Code 000	Function Code 3155	Object Code 570
• À la Carte	Project Reporting Code 000	Function Code 3110	Object Code 570

E. Required Additional Provisions

1. SFAs shall prohibit all contracts that permit all income and expenses to accrue to the FSMC and *cost-plus-a-percentage-of-cost* and *cost-plus-a-percentage-of-income* contracts.
2. Contracts that provide for FSMC guarantees or payments of funds to the SFA General Fund are not allowed.
3. Contracts that provide for indemnification by the SFA of the FSMC or other persons without approval of the grantor or State Agency are not allowed.
4. SFAs should ensure that the FSMC’s accounting system is adequate and that adequate cost data is provided.
5. It is recommended that contracts contain estimates of total costs. These estimates should be based in part on the preceding year’s operations. This type of estimate is required by Federal Acquisition Regulations; and while these regulations are not legally governing for these contracts, the total cost estimate is a good business practice.
6. While scholarship funds may be administered directly by an FSMC, the transfer of funds to a fund other than the nonprofit SFSA is not in compliance with 7 CFR §3016; OMB Circular A-102; and NSLP regulations, 7 CFR §210.

Revenues to the nonprofit school food service must be used solely to operate or improve the nonprofit school food service. Scholarships, or any other fund outside the nonprofit SFSA, are not necessary nor reasonable food service expenses and therefore cannot be funded from the SFA nonprofit SFSA.

FSMC contracts may not contain provisions, or allow noncontractual practices, which provide for payments that do not accrue to the nonprofit SFSA.

F. Prohibited Items

1. No firm, corporation, or individual shall blacklist or require a letter of relinquishment or publish or cause to be published or blacklisted any employee, mechanic, or laborer, discharged from or voluntarily leaving the service of such company, corporation, or individual, with intent and for the purpose of preventing such employee, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual. (Reference State Law §40-172)
2. FSMCs may not require any additional liability coverage, regardless of dollar value, beyond that which the SFA would require under procurements not involving an FSMC. This prohibition would be effective in any situation where the SFA conducts its own procurement or where the FSMC procures products on behalf of the SFA. (Reference FNS Instruction 1998-SP-25)

G Substantive Changes to Contracts

Substantive changes to an FSMC contract fall under two categories, both of which require rebidding the contract. First, there are those changes that must be initiated as a result of new services being desired by the SFA that are beyond the scope of the original contract. The second category includes those changes, though within the scope of the contract, that substantially change the value, terms, or conditions of the existing contract.

Whenever an SFA identifies a new service to be acquired that is beyond the scope or original intent of the contract, a separate solicitation that allows for full and open competition from all qualified bidders would be needed for the new service desired. (Reference USDA July 14, 2005, Procurement Questions, Q/A Number 4.)

Examples of new services include catering, à la carte sales, vended meals, convenience stores, vending machines, concessions, the SFSP, and the ASSP. If any of these new services are to operate in a facility participating in the NSLP, SBP, or SMP, then the entire contract for school food service would need to be rebid. This is due to the requirement that the FSMC may not contract to provide à la carte food service unless the FSMC undertakes the responsibility of managing the NSLP. If the new service will operate outside a facility participating in the NSLP, SBP, or SMP, then the new service may be bid separately.

Exceptions to the process of conducting a formal competitive procurement are allowable if the original RFP/ITB requested, and the contract provided for, the priced option(s) to implement the added service(s). Also, as an alternative to sending out a separate solicitation, in limited situations noncompetitive proposals as a means of procurement may be allowable. Noncompetitive proposals may be utilized in emergency situations when time does not permit conducting a formal competitive procurement and the current contractor has all the capabilities necessary to perform the new service. When this option is feasible, after negotiating price and terms, the contract would simply be modified to reflect the new services and charges.

The contract would also have to be rebid for those substantive changes within the general scope of the contract. Examples of substantive changes within the scope of the contract may include: changes to the formula for determining meal equivalency, any change in fees or basis for fee increases not reflected in the original RFP/ITB, a major shift in responsibilities for SFA/FSMC staff, a change in the menu-planning option not reflected in the original RFP/ITB, and significant changes in the basis for determining guaranteed returns.

H. For SFAs wanting to contract with an outside company to operate any aspect of food services, the following is a partial list of companies that have been used in the Southwest Region:

ARAMARK Corporation
School Support Services
1199 Beltline Road, Suite 160
Coppell, Texas 75019-4656
Phone: 972-462-6014

Barlow Education Management Services
2801 North Lincoln
Oklahoma City, Oklahoma 73105
Phone: 405-495-1911

Lisa R Bell
7137 Stoney Lonesome Road
Williamson, New York 14589
Phone: 585-754-8253
Lisabell50@gmail.com
www:cottoncandyclipartandgifts.com

Canteen of Central New Mexico, Inc.
4809 Hawkins, NE
Albuquerque, New Mexico 87109-4324
Phone: 505-344-3481

Chartwells School Dining Services
Attention: Randy Waugaman, Regional Sales Director
2249 Doc Holliday Drive
Park City, Utah 84060
Phone: 435-731-6278
E-Mail: randy.waugaman@compass-usa.com

CNP Management Services
Julie Hill
Phone: 918-855-4187

CNResource
Linda Rider
20 West 1st Street, Suite 107
Mesa, Arizona 85201
Websiteaddress: www.cnresource.com

Correctional Food Service Management
5727 North Black Canyon Highway
Phoenix, Arizona 85015
Phone: 602-249-2926

CSH Consulting
Christanne Smith Harrison, MPH, RD
102 Norcross Circle
Hamilton, New Jersey 08619
E-Mail: csharrison@optonline.net
Phone: 609-439-2089

Gourmet Solutions
Contact: Courtney Flories
101 East Park Blvd., #467
Plano, Texas 75074
Office Phone: 918-639-5798

Debbie Hulin Consulting, LLC
2300 West Walnut
Tecumseh, Oklahoma 74873
Phone: 405- 598-8102 (Office)
Phone: 405- 476-6344 (Mobile)
Fax: 405- 598-0247
E-mail: debbiehulin@valornet.com

Keith & Associates
Sandra Keith
6212 East 98th Street
Tulsa, Oklahoma 74137
Phone: 918- 298-3917 or 918- 639-5783

Keystone Food Service
Brett Feeback
P. O. Box 429
Stillwater, Oklahoma 74076
brettfeedback@gmail.com<mailto:brettfeedback@gmail.com>
Phone: 405-550-2006

Opaa! Food Management, Inc.
Greg Frost, VP, Regional Development
100 Chesterfield Business Parkway, Suite 310
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PROCUREMENT QUESTIONS AND ANSWERS

Question 1: If all our schools are equipped with a specific brand of coolers for which we maintain a supply of replacement parts and for which our maintenance staff is trained to repair, would we be able to request a specific brand, make, and model as a replacement?

Answer: Yes, with the approval of the State Agency (SA). Generally, restricting the procurement to a brand name or specific product is not permitted (§3016.36[c][vi]). However, situations do arise when a school food authority (SFA) has a compelling need, such as compatibility with current equipment, to purchase a brand-specific item. In this example, when supporting a request for permission to conduct a procurement for a specific brand of cooler, at a minimum, the SFA would need to document all of the following: the other available brands of coolers are not compatible with the SFA's current equipment, replacement part inventory, and maintenance staff's expertise. The SA can impose additional requirements prior to approving a brand name procurement.

If approved, the SFA would still need to maximize competition in the brand-specific procurement. In the situation presented, there may be more than one equipment distributor carrying the specific product. When an adequate number of equipment distributors did exist, the SA would approve the SFA to conduct a sealed bid procurement to acquire the replacement cooler. In conducting this procurement, the SFA needs to be alert to situations where suppliers are affiliated or associated which could result in collaboration or restrict competition. On the other hand, if only one supplier is available nationally, the SA can authorize the SFA to conduct a noncompetitive negotiation with that one supplier if noncompetitive negotiation is allowed under applicable state and local laws.

Question 2: Is the situation described in Question 1 a sole source procurement?

Answer: No, although a situation exists in which a specific make and model is needed, this is not a sole source procurement. In the Child Nutrition Programs (CNP), a sole source procurement occurs *ONLY* when the goods or services are available from only one manufacturer through only one distributor or supplier. While the specific cooler described in Question 1 is only available from one manufacturer, it is highly unlikely that there will be only one national distributor of that cooler.

Question 3: What is the difference between a noncompetitive negotiation and a sole source procurement since both involve negotiating with a potential supplier?

Answer: Noncompetitive negotiation is a procurement method used to compensate for the lack of competition, while sole source describes a condition of the procurement environment.

As stated in the answer to Question 2, a sole source situation occurs when the goods or services are only available from one manufacturer through only one supplier. 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.

Often, a sole source situation is confused with a lack of competition, which occurs when an SFA receives an inadequate number of responses to its solicitation. This lack of competition may result from overly restrictive solicitation documents, an inadequate number of suppliers in the area, or the procurement environment may have been compromised by inappropriate supplier actions (i.e., market allocation schemes). Unlike sole source in which a solicitation is not issued, noncompetitive negotiation occurs after the solicitation (sealed bid, competitive negotiation, or small purchase) has been issued, but competition on that solicitation has been deemed inadequate.

Noncompetitive negotiations are restricted to specific situations and may only be used when: (1) There is inadequate competition in a formal competition; (2) A public emergency exists; or (3) The awarding agency provides prior approval. Regardless of the circumstance, due to the absence of full and open competition, a contract cannot be awarded unless negotiations are actually conducted with one or more potential contractors. Negotiations must include both price and terms, using the same procedures that would be followed for competitive proposals.

Question 4: Can a distributor who carries multiple brands of pizza bid and receive an SFA's pizza contract if the distributor wrote the SFA's pizza specification?

Answer: No. 7 CFR Part 3016.36(b) prohibits an SFA from entering into a contract with a potential contractor who develops or drafts specifications, requirements, statements of work, invitations to bid (ITBs), requests for proposal (RFPs), contract terms and conditions, or other documents for use in conducting a procurement. Regardless of the number of pizza products available through the distributor, if a distributor wrote the specification used in the SFA's pizza bid, the distributor is not eligible for the award.

However, if the distributor simply provided information to the SFA about all or only one of its pizza products and the SFA wrote its own pizza product specifications, the distributor would still be eligible to compete for the procurement. 7 CFR Part 3016.36(b) is not concerned with potential contractors who simply provide information, but rather with those individuals and firms that are actually writing specifications, evaluation criteria, and other contract terms and conditions.

SFAs must have sufficient information to develop well-written specifications and procurement solicitations. SFAs can obtain adequate and pertinent information through a variety of sources, including trade shows, market research, conferences, and discussions with manufacturers and suppliers. Using all of these resources allows the SFA to develop a well-written solicitation that promotes full and open competition, which in turn leads to competitive responses and the best products and services at the best price.

Question 5: What are the *other documents* referenced in this phrase from 7 CFR Part 3016.60(b): *In order to ensure objective contractor performance and eliminate unfair competitive advantage . . . a person who develops or drafts specifications, requirements, statements of work, invitations to bid, requests for proposal, contract terms, and conditions or other documents for use by a grantee or subgrantee in conducting a procurement under the USDA entitlement programs . . . shall be excluded from competing for such procurements?*

Answer: *Other documents* refers to any documents that are used in any aspect of a procurement. This can include, but is not limited to, evaluation criteria, ranking criteria, bidder responsibilities, bidder requirements, SFA procurement practices, contract terms and conditions, payment terms, and SFA contract administration procedures. It is important to remember that procurement is not limited to the solicitation process, but includes all of the elements of the process from the initial determination that goods or services are needed through the retention of records following the expiration of the contract.

Question 6: Often SFAs will share bid specifications and other documents. What steps should an SFA take to make sure that these documents were not drafted by a potential contractor?

Answer: An SFA that uses another SFA's solicitation or contract documents should always ask as to the origin of the information so that it does not unintentionally violate the provisions of §3016.60(b). The SFA should pursue its inquiry until the original author of the documents is identified.

Question 7: Are Farm to School efforts exempt from the prohibition on using in-state or local geographic preferences?

Answer: No. Section 4303 of the Farm Security and Rural Investment Act of 2002 adds a new paragraph (j) at the end of Section 9 of the Richard B. Russell National School Lunch Act pertaining to purchases of locally produced products. The provision requires the Secretary of Agriculture to encourage institutions participating in the school lunch and breakfast programs to purchase locally produced foods to the maximum extent practicable.

However, in review of the Committee Notes to the 2002 Farm Bill, page 124 (note 53), although encouraging the purchase of locally produced product, Section 4303 does not allow for geographic preferences, *It is not the intent to create a geographical preference for purchases of locally produced foods or purchases made with grant funds.* The notes continue by stating, *The Managers want to make clear that SFAs are still required to follow federal procurement rules calling for free and open competition and limit local product purchases to those are practicable.*

Therefore, although SFAs participating in the NSLP and SBP are encouraged to purchase locally produced foods to the maximum extent practicable, this provision does not permit SFAs to use in-state or local geographical preferences. SFAs should always remember that all purchases must be made competitively, consistent with federal and state procurement laws and regulations.

Question 8: Does USDA's efforts to promote Farm to School mean schools do not have to follow procurement rules?

Answer: No. Although the Farm to School initiative was developed to encourage schools to purchase fresh fruits and vegetables from small, local farmers and growers, SFAs must make all purchases in accordance with all departmental procurement regulations and applicable state and local laws and statutes. However, this does not preclude SFAs from identifying potential local farmers or providing these farmers with its procurement solicitations. Further, an SFA can inform its local farmers of its interest in particular fresh fruits and vegetables so that the local farmers may plan future crop plantings accordingly. It is important to note that Farm to School purchases are often less than the applicable small purchase threshold. In these cases, SFAs are able to use these relatively simple, informal procedures to obtain these desirable products.

Finally, all produce purchases made through the Department of Defense meet USDA procurement regulatory requirements and SFAs may pursue Farm to School goals through coordination with the designated Department of Defense Produce Buying Office.

Question 9: Our SA requires that we use a mandated prototype contract when contracting with a food service management company (FSMC). The FSMC we selected has returned our state prototype contract with a couple of adjustments that it says will help us save money. Can I allow them to do so?

Answer: Since the prototype contract was developed and its use is mandated by the SA, only the SA can decide whether it will permit changes to that document. In making its assessment, that SA needs to determine if the changes are material (i.e., other potential contractors may have been chosen to bid differently had they known of the change) or are in violation of the requirements of §3016.60(b), which prohibits awarding a contract to a contractor that develops contract terms and conditions. Generally, if the proposed changes are material and the SA agrees that the changes are beneficial, the SA should amend its current prototype contract and the SFA should undertake a new procurement. If the SA determines the changes are not material, the SFA or the SA, not the contractor, would develop the actual contract terms and conditions.

Question 10: With the price of rising fuel costs, my distributor asked me to include a price adjustment in our current contract to help him recover some of his costs associated with these increases. I can see his argument. Can I give him an increase?

Answer: Price changes are permitted only when the SFA included terms for these price changes in its solicitation and contract documents. When the SFA agrees that a price adjustment factor is appropriate but did not include the adjustment factor in its procurement documents, the SFA needs to conduct a new procurement that includes the adjustment factor.

Question 11: My contract with a distributor is a fixed-price for the products for the entire term (12 months) of the contract with a fixed fee for delivery and service expressed as a percentage of the product fixed price as. Is this a *cost plus percentage of cost* contract?

Answer: No. The contract described above is a fixed-price for goods with a service fee expressed as a percentage of the fixed cost. In an actual cost plus percentage of cost contract, the percentage markup is added to the cost of the product, which is not fixed but changes over the term of the contract. This is the type of cost plus percentage of cost contract that is prohibited by §3016.36(f)(4). An example of a prohibited cost plus percentage of cost contract provision would be: *The distributor will be paid the cost of goods plus 10 percent of these costs.* In this type of pricing structure, the distributor is rewarded for increased costs and therefore has no incentive to provide the SFA with the best pricing available.

In the contract described in the question, the contractor will received a fixed price for the product and a distribution fee based upon the percentage of the fixed product cost. Since the price of the goods does not change for the contract period, the distribution fee in effect will remain the same and therefore it is also fixed. The distributor only increases its revenue based upon the actions of the SFA (i.e., increased purchase volume) and not through its own actions (i.e., the purchase of higher-priced product).

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