



**United States Department  
of Agriculture**

Food and  
Nutrition  
Service

# **Contracting with Food Service Management Companies**

## **Guidance for State Agencies**

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

(3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

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## Glossary of Terms

For the purposes of this guidance, the term:

**Bid** means an offer to perform for a fixed price, in accordance with the specifications and conditions set forth in an invitation for bids.

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

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

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

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

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

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

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

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

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

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

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

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

**Invitation for Bids (IFB)** means a type of solicitation document used in sealed bidding, where the primary consideration is cost and the expectation is that bids will be received and an acceptance (award) will be made to the responsive and responsible bidder whose bid is lowest in price. An IFB is a formal method of procurement that uses sealed bidding and results in a fixed price contract with or without adjustment factors. The IFB must be publicly solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids. Also, the IFB should describe the minimum standards expected of a responsible bidder in measurable terms.

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

**Noncompetitive Proposal** – found in 2 CFR 200.320(f) Procurement by noncompetitive proposals

is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

- (A) The item is available only from a single source;
- (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (C) The awarding agency authorizes noncompetitive proposals; or
- (D) After solicitation of a number of sources, competition is determined inadequate.

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

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

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

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

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

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

**Request for Proposals (RFP)** means a type of solicitation document used for the formal procurement method of competitive proposals. The RFP identifies the goods and services needed and all significant evaluation factors. The RFP is publicized and is used to solicit proposals from a number of sources. Negotiations are conducted with more than one of the sources submitting proposals, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive proposals may be used if conditions are not appropriate for the use of competitive sealed bids.

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

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

**School Food Authorities (SFAs)** means the governing body which is responsible for the administration of one or more schools, and has legal authority to operate the National School Lunch Program or School Breakfast Program therein *or* be otherwise approved by FNS to operate the

program. The school system superintendent is typically the person authorized by the governing body to sign legal documents for the SFA.

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

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

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

**Solicitation** means a document used by the SFA to acquire goods and/or services. Solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Solicitations must also identify all of the contract provisions required by Federal procurement regulations, requirements, terms, and conditions which the offerors must fulfill and all other factors to be used in evaluating the bids or proposals.

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

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

## Introduction

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

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

The purpose of this State agency guidance is to provide the actions States must follow to ensure compliance with both Program regulations and Federal procurement standards and cost principles. The NSLP regulations appear at 7 CFR 210, the SBP regulations appear at 7 CFR 220, the SMP regulations appear at 7 CFR 215, the SFSP regulations appear at 7 CFR 225, and the CACFP regulations appear at 7 CFR 226. Federal procurement standards and cost principles are located at 2 CFR 200. SFAs receiving USDA Foods must also comply with regulations at 7 CFR 250. As provided in 7 CFR 210.19(e), State agencies may impose additional requirements which meet or exceed the required Federal standards. Additionally, this guidance identifies areas of technical assistance in which State agencies may aid SFAs in strengthening contracts with FSMCs.

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

In contracting with an FSMC, the SFA must use competitive procurement procedures, solicitation, and contract documents that include required provisions in compliance with Federal, State, and local procurement regulations. Additionally, the SFA must include provisions to adequately safeguard the SFA as well as ensure that the FSMC manages the food service in accordance with Child Nutrition Program regulations, the SFA-State agency agreement, and the objectives the SFA seeks to achieve. To accomplish this, the SFA must have a sufficient number of knowledgeable



staff to:

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

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

The State agency should consider reviewing the *FSMC Guidance for SFAs* when assisting SFAs with determining if contracting with an FSMC is the best approach to managing the food service operation.

## Chapter 1: Overview of State Agency Responsibilities

Effective State agencies oversight of SFAs entering into contracts with FSMCs requires expertise in contracts and procurement, attention to detail, and an understanding of Program operations and regulations. Further required is a commitment to ensuring that Program benefits are delivered efficiently in the manner Congress intended under the National School Lunch Act and the Child Nutrition Act of 1966.

Due to the technical nature of these responsibilities, a State agency is encouraged to seek out and utilize sources of expertise in the areas of contracts and procurement. This might be accomplished by using the services of a contract specialist within the State agency or from another State government organization. Assistance from sources such as the Food and Nutrition Service Regional Office, the State agency's general counsel and internal audit group, the State Attorney General's Office, and the State procurement office, may be available to provide State agency's with additional expertise. When a large number of FSMCs and resources are available, the State agency is encouraged to consider employing full-time contract specialist(s) on the State agency staff, or contracting for the expertise needed.

The State agency responsibilities relating to SFAs entering into contracts with FSMCs are set forth in the NSLP regulations at 7 CFR 210.19(a)(5) which require the State agency to:

- Annually review each contract (including all documentation supporting the original solicitation) between any SFA and FSMC to ensure compliance with all the provisions and standards set forth in this part prior to execution of the contract by either party. As part of this review, State agencies must ensure that SFAs include the following provision, or language that is tantamount to this provision, in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority. The contract provisions for cost-reimbursable contracts in 7 CFR 210.21(f) and are included in Appendix A.
- Ensure that State agency-approved FSMC prototype solicitation and contract documents used by SFAs meet the provisions of the governing regulations and that all changes made to the prototype contract are reviewed and approved annually by the State agency prior to execution of the contract.
- Conduct an **on-site review of each contracting SFA** at least once during each 5-year period. Such reviews must include an assessment of the SFA's compliance with 7 CFR 210.19(a)(5) and with 210.16. When purchasing services are included in the SFA solicitation and contract, the State agency must monitor how the SFA is conducting contract performance management for tracking discounts, rebates, and credits for commercial food and supplies (cost-reimbursable contracts), and ensuring the value of USDA Foods is returned to the nonprofit food service account (both cost-reimbursable and fixed-price contracts), compliance with Buy American and if applicable, and

geographic preference. The State agency is encouraged to conduct such monitoring when conducting reviews in accordance with 210.18.

- Provide technical assistance to participating SFAs.

In addition to the regulatory requirements regarding State agency oversight, the State agency may require an FSMC to register with the State agency as a condition for consideration of an invitation for bids (IFB) or request for proposals (RFP) issued by any SFA under the State agency's oversight.

This guidance addresses FSMC registration, content, contract review, on-site review activities, and training and technical assistance.

## Chapter 2: FSMC Registration

### General

Program regulations at 7 CFR 210.19(a)(5) state: “The State agency may require that all food service management companies that wish to contract for food service with any school food authority in the State register with the State agency.”

Formal registration offers State agencies an opportunity to identify all FSMCs operating in their State and allows State agencies to develop a profile of those FSMCs. This information will prove useful in the State agency's monitoring activities. Registration also enables the State agency to provide interested SFAs with information on specific companies as well as with the names of SFAs that contract with FSMCs.

### Timing

In order to effect this requirement, State agencies must ensure that SFAs and FSMCs are given proper notice of the registration requirement. State agencies should issue a public announcement, prior to the registration period, of the registration requirement. The announcement should include all the information necessary to apply for registration. A public meeting, held prior to the registration deadline, is encouraged to offer FSMCs an opportunity to obtain further clarification of the State agency requirements. Though not required, when the SFA is considering contracting with an FSMC, State agencies are encouraged to consider offering training to FSMCs and SFA business officials regarding Program requirements. If the State has a registration requirement, SFAs should be notified that a provision regarding the registration requirement be included in the IFB/RFP. In such case, when preparing specifications for IFBs and RFPs, SFAs should include language addressing the registration requirement as a **condition for considering an IFB or RFP**. Inclusion of this provision provides adequate notification to any interested offerors, thus ensuring that no offerors are excluded from bidding or offering on a contract.

Shortly after the registration deadline, the State agency may want to consider notifying SFAs of the FSMCs that have been registered. SFAs can refer to this official list of FSMCs that are allowed to enter into SFA contracts in the State.

### Profile Information

State agencies may consider obtaining the following information in their registration process:

- Name and address of the FSMC.
- Contact person.
- Corporate profile, for e.g.:
  - whether the company is incorporated;
  - other names the company is using or has used;
  - if the company participated in SFA contracts,
  - the number of contracts awarded/terminated;
  - any type of citation the company received for health, safety or sanitation violations; and
  - whether the company is providing meals in the CACFP and/or the SFSP.

- Personnel profile, for e.g.:
  - names and titles of individuals from the company authorized to sign contracts;
  - all individuals who are owners, officers, local area representatives, or consultants; and
  - any individuals with at least five percent financial interest in the FSMC.

In addition, State agencies may provide template certifications for debarment and suspension (Appendix C; FNS template is obsolete but may still be used as a sample) and regarding lobbying (Appendix D) and with the registration form. Regulations regarding lobbying are located at 2 CFR 200.420. SFAs entering into procurement contracts for goods or services must obtain assurance that potential offerors have not been suspended, debarred, or proposed for suspension or debarment. Regulations regarding debarment and suspension are located at 2 CFR 200.212. These provide grantees with three options for obtaining satisfaction that prospective contractors are not suspended, debarred, or disqualified, including: (a) Checking the Excluded Parties List System (EPLS) (<http://epls.arnet.gov>). When exercising this option, SFAs should ensure they document that the offeror was checked against the system; or (b) Collecting a certification from that person if allowed by this rule; or (c) Adding a clause or condition to the covered transaction with that person.

USDA no longer uses a debarment and suspension certification form; however, the sample certification form is provided for State agencies and SFAs to use on their letterhead in the event this method of certification is preferred. Submission of this certification to the State agency does not relieve the FSMC of its responsibility to submit a **current** certification to each SFA with which it wishes to do business. This is especially important in that a certification furnished to the State agency may become outdated by the time the FSMC approaches the SFA or responds to their solicitations; a pending debarment or suspension action may have become effective.

## Chapter 3: Prototype Solicitation and Contract

### Documents

When the State agency develops, and requires SFAs to use, a State agency prototype solicitation and contract document, the State agency must ensure that all required contract provisions are included.

Solicitation and contract provisions are found in Program regulations, as applicable (7 CFR 210.16, 210.21, and 250-Sub D ), as well as the 2 CFR 200.318-326 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, and Appendix II of 2 CFR 200. These provisions are located in Appendix A.

Solicitation documents and subsequent contracts must include all contract provisions for SFAs and FSMCs to comply with Federal procurement regulations. These requirements include:

#### **Program specific requirements, as applicable:**

- Provisions for SFAs in 7 CFR 210.16(a)(1-10)
- 21-day cycle menu in 7 CFR 210.16(b)
- Nonperformance provision with sanctions for violations in 7 CFR 210.16(b)(2)
- Contracts in 7 CFR 210.16(c)
  - Cost-plus-a-percentage-of-cost and cost-plus-a-percentage-of-income are prohibited
  - Record retention requirements for FSMCs
  - Health certification requirements
  - No payment for unwholesome meals; meals not meeting specifications; and not meeting meal pattern requirements in 7 CFR 210.10 and 220.8, as applicable
  - Contract duration and contract termination clause in 7 CFR 210.16(d)
- Buy American [7 CFR 210.21(d)]
- Required provisions when using cost-reimbursable contracts and prohibited expenses in 7 CFR 210.21(f)
- Geographic preference option, if applicable in 7 CFR 210.21(g)
- Meal pattern requirements for all applicable Programs, if operated
- Civil Rights in 7 CFR 210.23(b) and FNS-113, Appendix B

#### **Required provisions for cost reimbursable contracts:**

- The SFA must include in cost reimbursable contracts, or contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts:
  - That costs be net of discounts, rebates, and other applicable credits provision [210.21(f)(1)(i)];
  - Provisions that identify un/allowable costs or certify that only allowable costs submitted for payment and records establishing visibility of unallowable cost provision [210.21(f)(1)(ii)];
  - Allowable costs comply with applicable regulations [210.21(f)(1)(iii)];
  - Contractors must individually identify the type and amount of each discount, rebate,

and other applicable credit on bills

- State agency may approve contractor to report less frequently than monthly, but in any case, no less frequently than annually; [210.21(f)(1)(iv)];
- Contractor must identify how it will report discounts, rebates, and other applicable credits, not previously reported, before the conclusion of the contract [210.21(f)(1)(v)]; and
- The contractor must maintain documentation of cost and discounts, rebates, and other applicable credits and furnish such upon request by the SFA, State agencies, or the Department.

#### **Donated food requirements:**

- Required contract provisions in 7 CFR 250.50-53 including:
  - Contract requirements and procurement of USDA Foods in 7 CFR 250.50
  - Crediting for, and use of, USDA Foods in 7 CFR 250.51
  - Storage and inventory management of USDA Foods in 7 CFR 250.52
  - Contract provisions for fixed-price and cost-reimbursable contracts, as applicable in 7 CFR 250.53
  - Recordkeeping and review requirements in 7 CFR 250.54

#### **Uniform administrative requirements, cost principles, and audit requirements for federal awards of 2 CFR 200:**

- If subcontracts are let, a requirement to take the affirmative action steps for small and minority businesses, women's business enterprises, and labor surplus area firms will be used when possible. [2 CFR 200.321]
- Procurement of recovered materials. [2 CFR 200.322]

#### **Required provisions in Appendix II of 2 CFR Part 200**

- Contracts for more than the Simplified Acquisition Threshold currently set at \$150,000 must address administrative, contractual, or legal remedies in instances where contractors violate breach of contract terms and provide such sanctions and penalties as appropriate. [2 CFR 200 Appendix II(A)]
- Termination for cause and for convenience clause included with the manner by which it will be effected and the basis for settlement. (For contracts in excess of \$10,000 only) [2 CFR 200 Appendix II(B)]
- Equal Employment Opportunity (federally assisted construction contracts)
- Contract Work Hours/Safety Standards Act (40 U.S.C. 3701-3708) (in excess of \$100,000)
- Davis Bacon Act (Construction contracts in excess of \$2,000)
- Rights to Inventions Made Under a Contract or Agreement. (All applicable contracts)
- Clean Air Act (42 U.S.C. 7401-7671q.) and Federal Water Pollution Control Act (33 U.S.C. 1251-1387)(for contracts and subgrants of amounts in excess of \$150,000)[2 CFR 200 Appendix II(G)]
- Debarment and Suspension (Executive Orders 12549 and 12689)[2 CFR 200.213 and Appendix II to 2 CFR 200 (H)] (All contracts)

- Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) (\$100,000 or more) [Appendix II to 2 CFR 200 (I)]
- Procurement of recovered materials [2 CFR 200 Appendix II(J) see Part 200.322]

**Written standards of conduct covering conflicts of interest**

All parties (State agency, SFA, and any subcontractor or affiliate) are prohibited from real, or apparent, conflicts of interest governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real, or apparent, conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, standards may be set for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of parties. [2 CFR 200.318(c)(1)]

If a party to the contract has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the party must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the party is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. [2 CFR 200.318(c)(2)]

This includes receiving gifts or other items outside of the scope of the solicitation such as football signs, vacations, and kitchen equipment. Such things create a conflict of interest and should not be accepted. If an offeror provides these types of items, the offeror would be considered overly responsive and should be disqualified to be awarded the contract.

**State-specific procurement requirements:**

State agencies often have State procurement requirements that may also apply. The State agency is strongly encouraged to work with their State’s legal counsel, State Purchasing and/or Administrative Services Office(s) to incorporate State provisions into their prototype agreement, as applicable. Such provisions may include, but are not limited to, minimum requirements for:

- Comprehensive liability insurance
- Workmen’s compensation insurance

**Use and Crediting of USDA Foods:** For SFAs receiving USDA donated foods, the value of USDA Foods must be credit to the nonprofit food service account. Therefore, the prototype solicitation and contract must include language for the State agency or SFA, as applicable, to specify the method of value pass-through to be used. These may include: net-off invoice (NOI), fee for service, direct discount, or rebate system. For State agencies that



are different from State Distributing agencies, these agencies will need to collaborate on the language and frequency of crediting to be used in the prototype solicitation and contract documents. For State agencies that do not have a prototype solicitation and contract document, these States must be aware of the approved value-pass through methods in the State and ensure the SFA solicitation and contract language is in compliance with the State Distributing agency requirements.

### **Financial terms**

Prototype documents need to include resource management requirements found at 7 CFR 210.14, including net cash resources, financial assurances, use of donated foods, pricing paid lunches, revenues from non-program foods, and using revenues received by the nonprofit food service that are *only for the operation or improvement of such food service*. When the SFA intends to have the FSMC assist with completing the paid lunch equity tool and documenting non-program foods revenues and expenditures, the original solicitation needs to include these requirements.

### **Identify Scope of Contract**

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

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

- Identify which Federally reimbursable meal program(s) or nonprofit food service activities the FSMC will be involved in, e.g., NSLP; SBP;SMP; FFVP; SFSP; At-Risk Afterschool Program; non-program foods and meals, such as a la carte sales during and/or between meal service periods; after hours snacks; and other food service operations, as required (i.e., catering services, if applicable).
- Identify what role, if any, the FSMC will play in procuring products and services on behalf of the SFA, i.e., will the FSMC be acting as the procuring agent for the SFA.
- Decide if the operation of any SFA vending machines will be serviced by the FSMC.
- Decide if the FSMC will cater any special activities and/or be involved in any food service activity outside the nonprofit food service. These special activities may require a separate food service account (7 CFR 210.14(c)) or may be charged to the General Fund to ensure the nonprofit food service account is used exclusively for the operation and improvement of the food service.
- Decide what specific activities relating to USDA Foods the FSMC will be required to perform, in accordance with 7 CFR 250.50(d). Such activities may include, for example:

- 1) The competitive procurement of processed end products (i.e., containing USDA Foods) on behalf of the SFA (such procurements must ensure compliance with the requirements in 7 CFR 250, Subpart C, and with processing agreements between the processor and distributing agency or SFA). Please note that SFAs must confirm their original solicitation and subsequent contract included provisions for the FSMC to accept and further process USDA Foods.
- 2) The ordering or selection of USDA Foods, in coordination with the SFA.
- 3) The storage and inventory management of USDA Foods. At a minimum, a year-end inventory of USDA Foods must be conducted; however, SFAs may include in their solicitation more frequent inventory reporting, such as on a monthly basis, to ensure the maximum use of USDA Foods.
- 4) The payment of processing fees or submittal of refund/rebates requests to a processor on behalf of the SFA, or remittance of refunds for the value of USDA Foods in processed end products to the SFA, in accordance with the requirements in 7 CFR 250, Subpart C.

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

Clearly identifying the scope of work will greatly reduce the potential need for contract amendments during the life of a contract.

### **Material change in contract amendments**

Contract amendments that modify the scope or change the value of a contract in excess of the Simplified Acquisition Threshold may result in a material change, making them subject to State agency review and approval prior to execution. To avoid amendments, States and SFAs are strongly encouraged to consider all programs and school district plans that, if adopted, may result in contract amendment(s). These may include:

- Plans in current or optional renewal years to change Program operations, such as changing to Special Provisions or the Community Eligibility Provision, plans for expansion through new schools, construction and/or operation of schools due to projected increases in enrollment or the adoption of charter schools to be affiliated with the LEA, as well as the addition of other Federal Child Nutrition Programs, etc.
- Fee adjustments to payments are not permitted unless provided for in the IFB or RFP and incorporated into the resulting contract, in order to prevent any material change to a contract. If an adjustment to payment is to occur, the fee structure prescribed in a contract may require adjustment if actual experience does not conform to the

assumptions upon which the original fee structure was based. Such cases may include unanticipated drops in enrollment or lowering of Federal reimbursement rates. Contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms as long as scope and contract modification do not create a material change. If the contract is amended, State agency prior review and approval is required. (7 CFR 210.16(a)(10))

- Plans in current or optional renewal years to change the number of schools due to increases or decreases in enrollment or the consolidation of schools, etc.

Estimating prices/cost: Provisions are encouraged that outline how potential offerors are to estimate costs for bids/proposals and what criteria are to be considered in management fees and administrative fees. Additionally, in contracts that include expenditures on a price-per-meal or projected cost-reimbursement for products and/or services, all expenditures are to be estimated by cost account, such as food, supplies, equipment, etc., and all direct and indirect expenditures must be identified.

An example of such costs may include the cost for administrative/management fees. Fees may vary from one FSMC to another. Therefore, SFAs are encouraged to specifically identify what costs are to be included in these fees. Any additional costs identified by FSMCs beyond those specified by the SFA must be included when evaluating responses to determine the offer that is most advantageous to the SFA with price as the primary consideration. Costs may be quoted by FSMCs as a flat fee per meal, or may be quoted as an annual cost to be invoiced for payment to the FSMC as specified in the solicitation (i.e., payment frequency may be prorated retroactively for payment monthly, quarterly, semi-annually, or annually). Administrative costs often include: personnel and labor relations services, travel costs for visitation on behalf of the FSMC; legal services; purchasing and quality control; technical research and supervision; cost incurred in hiring and relocating FSMC management personnel; dietetic services-administrative and nutritional; test kitchens; accounting and accounting procedures; tax administration; supervisory personnel and regular inspections or audit personnel; teaching and training programs; general regional support; general national headquarters support; design services; menu development; information technology and support; payroll documentation and administrative cost; sanitation; personnel advice, etc.

All costs to be included in the administrative/management fee must be clearly outlined in the solicitation and subsequent contract.

### **Insurance requirements**

Specify requirements of the State regarding insurance coverage for:

- Comprehensive General Liability:
  - Premises—Operations
  - Products—Completed Operations
  - Contractual Insurance
  - Broad Form Property Damage
  - Independent Contractors
  - Personal Injury

- \$ \_\_\_\_\_ Combined Single Limit.
- Workers' Compensation—Statutory; Employer's Liability \$ \_\_\_\_\_ Combined Single Limit.
- Automobile Liability coverage
  - \$ \_\_\_\_\_ Combined Single Limit.
- Excess Umbrella Liability
  - \$ \_\_\_\_\_ Combined Single Limit.

SFAs shall be included as additional insured on General Liability, Automobile, and Excess Umbrella policies and the contract of insurance shall provide for notice to SFA of cancellation of insurance policies 30 days before such cancellation is to take effect. SFA shall not be liable to FSMC for any indemnity.

### **Contractual Conflicts**

In the event of a conflict between or among any of the terms of the SFA-FSMC contract documents, such conflicts shall be resolved by referring to the documents in the following order of priority: (i) SFA's invitation for bids or request for proposals solicitation followed by (ii) FSMC bid/proposal documents, (iii) SFA-FSMC contract, if different from the solicitation document. No modification or amendment to a contract shall become valid unless it is made in writing, signed by all parties, and receives prior approval by the State agency.

Furthermore, the SFA alone must 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. [2 CFR 200.318(k)]

### **Audit provisions (cost-reimbursable contracts only)**

When cost-reimbursable contracts are awarded, SFAs are strongly encouraged to include an audit provision that the SFA will periodically request supplier invoices to check prices to ensure the costs charged to the SFA are the costs paid by the FSMC for products and services. Audits may be announced or unannounced and may be performed weekly, monthly, quarterly, or as often as the SFA specifies. When discrepancies in pricing are identified between what the FSMC billed on invoices compared to what the supplier charged, and the nonprofit food service account has been over-charged, this difference must be returned to the nonprofit food service account as a credit delineated on the next billing cycle. When the audit identifies the SFA was charged for less than the cost paid by the FSMC, this difference may be paid by invoice to the SFA.

- An alternative to this audit provision may be to require the FSMC to submit documentation with each bill/statement/invoice to support all charges to be paid from the nonprofit food service account

### **Equipment Replacement/Improvements/Investments**

If the SFA intend the FSMC to procure equipment, replacement or improvements of equipment, and/or investments the SFA must have a total dollar value for this equipment clearly specified in the solicitation. The value may be specified per year or as a maximum

total value over the potential of four optional renewal years. Ownership of the equipment must at all times remain with the SFA regardless of the procuring entity. **Any equipment costing \$5,000 or more must be approved in advance by the State agency (until the State agency publishes an FNS-approved list of capital equipment pre-approved for purchase)** (SP 31 – 2014, *State Agency Prior Approval Process for School Food Authority (SFA) Equipment Purchases*, dated March 28, 2014.) All expenses must be allowable and are subject to the priority of funds in the nonprofit food service account.

- SFAs and FSMCs must not incorporate into their contract by any method terms that the FSMC will provide items without the SFA stating what they are seeking in the RFP. Also, please note that inserting \$4,999.00 to avoid the \$5,000.00 limit will not allow the SFA to later increase that amount. Equipment improvement provisions must also state:
  - Financing terms and amount which must not exceed the dollar amount specified in the solicitation.
  - SFAs/FSMCs must conduct procurement procedures in compliance with Federal, State, and local requirements and for any transaction that is financed by the FSMC, and the FSMC shall not be the vendor. SFAs shall repay any financing provided by FSMCs based on an amortized schedule at the interest rate not to exceed the amount allowable by State law and as specified when the equipment was purchased, which sum shall be charged to SFAs as a direct cost to the food service program.
  - If the contract expires or is terminated prior to the complete repayment of the investment, SFA shall, on the expiration date, or within five days after receipt by either party of any notice of termination under this contract, either:
    - Deliver the equipment items funded by the investment to the FSMC in full release of the unpaid balance; or
    - Retain the property and continue making payments in accordance with the amortization schedule.

### **Information Technology Systems, As Applicable**

Cost reimbursable contracts only: the FSMC shall provide, install, deploy into production, operate and maintain and support an information technology system (the “IT System”). The IT System may include, but is not be limited to, hardware, owned and licensed software and systems support necessary for the operation of SFA’s Food Service Programs. SFA shall receive a charge for the use of the IT System. The cost methodology utilized in determining such charge shall be kept on file by the SFA on the SFA’s premises. The SFA shall provide, at its expense, a suitable environment, including such heat, air conditioning, and phone and utility service as may be reasonably required for the installation, implementation, operation and maintenance of the IT System. FSMC’s IT System shall provide the following services:\_\_\_\_\_. (When included in solicitation, SFAs must include functions, performance, utility, and support-system requirements.); or

All fees must be part of the fixed-meal rate:

FSMC shall provide, install, deploy into production, operate and maintain and support an information technology system (the “IT System”). The IT System may include, but is not be limited to, hardware, owned and licensed software and systems support necessary for the operation of SFA’s Food Service Programs. SFA shall provide, at its expense, a suitable

environment, including such heat, air conditioning, phone and utility service as may be reasonably required for the installation, implementation, operation and maintenance of the IT System. FSMC's IT System shall provide the following services:

\_\_\_\_\_. (SFAs must include functions, performance, utility, and support-system requirements in solicitation documents, when applicable.)

**Other (To be identified by SFA before issuing RFP)**

Any changes to State agency prototype documents (solicitations and contracts) must be reviewed and approved in writing by the State agency prior to issuing the revised solicitation or execution of the revised contract. [7 CFR 210.21(c)(2)]

Contract provisions may vary by State and may be subject to State agency approval for any SFA opting to include provisions based on the priority of the purchase in relation to the SFA nonprofit food service account.

**Solicitation Documents and Contract Types**

Solicitations for products or services in Child Nutrition Programs must be competitively conducted using competitive sealed bids or competitive proposals as outlined in the procurement methods located in 2 CFR 200.320. Therefore, State agency prototype FSMC solicitation documents must be developed using these methods. The solicitation document must clearly state the contract type to be awarded. Contract types that may be awarded by these solicitation methods are identified below:

<u>Solicitation Method</u>	<u>Contract Type for Award</u>
Competitive Sealed Bid (IFB)	Firm, fixed-price Firm, fixed-price with price adjustment tied to a standard price index
Competitive Proposal (RFP)	Firm, fixed-price, with, or without price adjustment as designated above Cost-reimbursable cost with, or without a fixed fee

However, within these contract types variations developed by State agencies include:

- Fixed-price for management and administrative services only
- Fees may be identified as a price/meal, or an annual dollar value. Payment frequency (i.e., one-time payment annually at the end of the contract period, or pro-rated monthly for payment in full by the end of the contract period) must also be established in the solicitation and contract documents.
- Fixed-price for management and administrative service and a price-per-meal for each meal served in each program operated (NSLP, SBP, SFSP, CACFP, At-Risk Supper, and/or FFVP, etc.) and for how meal equivalents will be calculated for a la carte sales, etc.
  - This price-per-meal is to be quoted without consideration for the availability of USDA Foods used in prior years or based on estimated

entitlement values for upcoming school years. Entitlement values for USDA Foods vary from one year to next; therefore, USDA Foods must be identified as a credit on invoices submitted by the FSMC for payment to the SFA. In fixed-price contracts purchased credits and prompt payment discounts do not apply and the return of any applicable credits is only for USDA Foods.

- Cost-reimbursable for management and administrative services only
- Cost-reimbursable for management and administrative services and an estimated cost of all projected expenditures for purchased products (food, supplies, equipment, etc.) provided by the FSMC. Discounts, rebates, and applicable credits on invoices submitted for payment to the SFA related to apply to USDA Foods, commercially purchased products, and services received by the SFA.
- Cost-reimbursable contracts for management, administrative services, estimated cost of all projected expenditures for food, supplies, equipment and other products and services provided by the FSMC. The cost of hiring and paying wages, benefits, and withholding requirements for labor required for operating the programs. When solicitations include provisions for the FSMC to retain labor for the operations, additional language regarding how labor will be transitioned from the SFA to the FSMC must be included in the solicitation and responses. Such items may include the number of labor hours to be charged to the SFA based on the number of meals served by Program operated, including meal equivalents for a la carte sales, and others revenues, as applicable. If the solicitation includes a provision for the FSMC to retain employees only upon turnover of SFA employees, details must be included on how this transition will occur. Discounts, rebates, and applicable credits on invoices submitted for payment to the SFA related to apply to USDA Foods, commercially purchased products, and services received by the SFA.

State agencies are not required to develop and offer a variety of contract types, and may limit contract types offered within the State based on the level of expertise and skills with procurement, contract negotiation, and evaluation of responses available within SFAs and the State agency. State agencies must ensure that contract types are limited to fixed-price or cost-reimbursable type contracts and provisions are not added to contracts after evaluation and negotiation, or during renewals, that create a hybrid contract-type through amendments within the contract duration period. **State agencies are reminded that a cost plus a percentage of cost methods of contracting is prohibited. [2 CFR 200.323(d)]**

## Evaluation and Scoring Criteria for Contract Award

### Award Criteria

Proposals must be publicized and identify all evaluation factors, their relative importance, and have a written method for conducting technical evaluations of the proposals. Recipients must be selected to ensure contracts are awarded to the responsible firm whose proposal is most advantageous to the program, with price as the primary factor, and other factors considered. [2 CFR 200.320(d)] SFAs conducting evaluations and scoring proposals are encouraged to use a committee approach to evaluate responses and document how the contract award was determined. Determinations should be based on the offer per meal/meal equivalent/cost with the categories and assigned weights stated in the solicitation.

The committee must consist of SFA employees and all committee members must be familiar with Child Nutrition Program regulations. No member of the committee may be an agent for, employee of, associated or affiliated with an FSMC in any manner. Additionally, any FSMC or consultant hired by the SFA will be precluded from participating in the RFP and subsequent contract. Each area of the award criteria must be addressed in detail in the Proposal.

### Weighted Criteria

SFAs must determine in advance what percentage/points (total of 100 percentage/points) for each category that will be given when comparing proposals. **State agencies and SFAs are reminded that price/cost must be the primary criteria in scoring proposals.** This means price/cost must have the most weight of all scores, not that the score for price/cost is equal to or greater than 51 on a total value 100 based on percentage/points. However, State agencies and SFAs are well within their rights to weight price at or above 50%, if desired. Regardless of the number of categories to be scored, SFAs may not include prior experience with the SFA as a category during any competitive procurement procedure, including when soliciting for an FSMC. Doing so violates USDA's full and open competition regulation for procurement. There may, however, be categories demonstrating a complete understanding of the food service program and its service requirements.

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

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

100 points/% TOTAL

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



### **Sealed bid versus competitive proposals**

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

## Chapter 4: Review Activities

### Contract Review

The SFA-FSMC contract is the major factor in assuring a meal service that not only meets the best interest of the SFA but also conforms to USDA, State, and local requirements in a cost-effective manner. The contract is the basis for successful and appropriate oversight by the SFA. The State agency must ensure that the SFA-FSMC contract includes all required provisions and does not contain any unallowable provisions.

Section 210.19(a)(5) requires each State agency to annually review, prior to execution by either party, each SFA-FSMC contract (including all supporting solicitation documentation) to ensure compliance with all the provisions and standards set forth in this part. When the State agency develops a prototype contract for use by the SFA that meets the required provisions and standards, this annual review may be limited to changes made to that contract. Additionally, each year the contract is to be renewed, the State agency shall review the SFA-FSMC contract renewal prior to execution by either party to ensure compliance with all provisions and standards set forth in this part. The State agency may establish due dates for the submission of the contract or contract renewal documents.

**Contract amendments (to be avoided):** SFA-FSMC contracts often change during the course of a school year due to unforeseen circumstances that arise. SFAs are encouraged to forecast beyond one school year prior to soliciting for the services of an FSMC to avoid having to amend a contract as contract amendments may result in a material change requiring the contract to be re-solicited in time for the next school year. A material change is defined as a change that, had other bidders known of the change at the time of they submitted their responses, would have caused them to bid differently. 2 CFR 200.324(b)(5) identifies that when a contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold (currently set at \$150,000; see 2 CFR 200.88), the non-Federal entity must make available upon request for review, procurement documents such as requests for proposals or invitations for bids, and/or independent cost estimates. The awarding agency must then determine if the amendment is approved for a one-year renewal, or if a rebid is required at the end of the current contract period. State agencies and SFAs are reminded that State or local acquisition thresholds may be more restrictive and that the most restrictive threshold applies.

Some amendments to contracts that may be considered material and thus require a re-bid include:

- Adding other SFAs, or unaffiliated schools (to include new schools to be constructed within the SFA during the contract duration and potential contract renewals) not included in the original solicitation.
- Adding more Child Nutrition Programs not included in the original solicitation and contract.
- Changing a fixed-price/meal fee for management and/or administration, or a fixed-price/meal fee tied to a standard index, such as the Consumer Price index, without a price adjustment clause.
- Adding the requirement for the FSMC to cover the cost of labor, or to transition the cost of labor from the SFA to the FSMC without a provision in the original solicitation and contract that includes the labor transition with specifics for how this will occur.
- Adding requirements for the FSMC to purchase/invest in equipment, point of service

system, or remodel/renovate facilities for the SFA that were not planned, specified, or included in the original solicitation and contract.

- Changing the value of a guaranteed return, or failure to achieve a breakeven status, or qualifying these by limits in relation to the value of the administrative/management fee(s).
  - Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. Returns cannot be contingent upon multi-year contracts as FSMC contracts are for one year with the option for up to four one-year renewals. If the option for renewal is to be considered each year, the best practice is to specify in the original solicitation the SFAs expectations of the guarantee for each renewal year option, if changes in the guarantee will be allowed.

While this list is not exclusive of changes SFAs and FSMCs often consider during a contract renewal option, these changes are amendments to the contract, not a contract renewal. Therefore, State agency and SFA staff must take great caution not to approve contract amendments when these changes should be re-solicited. Contract renewals are extensions of the original contract based on the terms and conditions of the original solicitation; contract amendments that change the scope of the contract, or exceed the value of the Simplified Acquisition Threshold (valued at \$150,000), are subject to approval by the State agency or FNS.

SFAs and FSMCs are reminded that regulations governing procurement in the NSLP, SBP, and SMP, require State agencies to review contracts (and supporting documentation) prior to the execution (i.e. prior to signature) of the contract to ensure that contracts containing unallowable terms and conditions and amendments that may be material in nature are removed prior to the contract being executed. Unallowable costs shall not be paid from the nonprofit food service account.

All cost reimbursable contracts must contain provisions clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. [210.21(f)(1)(i)] The State agency must ensure that SFAs include all required provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts. See Chapter 3: Prototype Solicitation and Contract, Documents for Required Cost Reimbursable Contract Provisions.

If when reviewing the SFA's contract, the State agency notes the SFA is not using a prototype contract, the State agency must ensure that the contract documents and any amendments thereto have been drafted or developed by the SFA and not an FSMC competing for the procurement. This regulation exists to ensure contractor performance and to eliminate any unfair competitive advantage. [2 CFR 200.319(a)]

The State agency must also ensure that State agency approved FSMC prototype contracts used by SFAs meet the provisions of the governing regulations and that all changes made to the prototype contract are reviewed and approved annually by the State agency and prior to execution of the contract [210.16(a)(10)].

The State agency must make certain that the SFA’s contract with an FSMC includes all of the provisions listed in 7 CFR 250.53, as applicable. In accordance with 7 CFR 250.50(c), the State agency must ensure that the SFA’s procurement documents include any USDA Food activities that an FSMC is to perform, such as those activities listed in 7 CFR 250.50(d), and all contract requirements for conducting such activities, as listed in 7 CFR 250.53. The procurement must specify the method used to determine the USDA Food values for crediting, or the actual values assigned, in accordance with 7 CFR 250.51. The method used to determine the USDA Food values may not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the procurement or contract.

State agencies are reminded that:

**Procurement by Sealed Bid**—The State agency should review the contract documents prior to issuance of the invitation for bids (IFB), as all variables, including a precise description of the 21-day cycle menu and food specifications for quality standards, are defined by the IFB. Only fixed-price contracts, with or without a price adjustment tied to a standard index, may be awarded when soliciting contracts using an IFB.

**Procurement by competitive proposal**—if the competitive proposal method is used, the request for proposals (RFP) describes desired outcomes and the weighted criteria that will be used to evaluate the proposal, including a 21-day cycle menu developed in accordance with the provisions of 7 CFR 210.10. State agency review of the RFP is beneficial when such a review occurs prior to the publication of the RFP. Either a fixed-price, with or without a price adjustment tied to a standard index, or cost-reimbursable costs with or without a fixed-fee, may be awarded when soliciting contracts using an RFP.

**Proposed Contract**—State agencies are required to review and approve all SFA contracts, renewals, addendums, and amendments (including all solicitation documents and evaluation and scoring documents) between SFAs and FSMCs prior to contract execution.

According to 2 CFR 200.323(d) a cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used. And, contracts that permit all income and expenses to accrue to the food service management company and “cost-plus-a-percentage-of-cost” and “cost-plus-a-percentage-of-income” contracts are prohibited. [7 CFR 210.16(c)]

## Evaluation of Contract

State agencies must carefully examine the terms of a contract to ensure that contracts comply with all requirements in 7 CFR 210.16(a) such as:

**SFA Responsibilities**—the SFA does not delegate those responsibilities with which they are assigned by regulations.

**Required Provisions**—all Federal and State required provisions are included.

**FSMC Responsibilities**—all goods and services to be provided by the FSMC, as well as all duties, responsibilities, and obligations of the FSMC, are clearly defined.

**Financial Terms**—the financial terms and conditions of the contract are defined.

**Performance**—specific language about performance is provided, including identifying the minimum level that the contractor must meet or exceed.

**Nonperformance**—all contracts, including contracts below the Simplified Acquisition Threshold, provide for legal and financial remedies for nonperformance.

**Unallowable Provisions**—provisions are omitted that are not in the best interest of the SFA, e.g., a time limit for liability for meals not meeting the meal pattern requirements, scholarships, incentives, gifts, travel packages, special events, catering accounts, overly responsive responses, and other unallowable cost items in solicitations and contracts. If the FSMC response includes such unallowable cost items, these responses must not be included in the evaluation and scoring to determine contract award, and may render the entire FSMC response ineligible for contract award.

**Supplementary Documents**—supplementary contract documents have been completed, for example, required certifications.

**Evaluation and Scoring Criteria**—SFAs must include evaluation and scoring criteria that results in a contract award using price/cost as the primary criteria. The evaluation and scoring process must be conducted as outlined in the solicitation with the contract award based on the results of a properly executed evaluation and scoring process.

**Contract Duration**—the duration of the contract is no longer than one year. Options for contract renewal must not exceed four additional years.

**Contract Renewals**—the State agencies must require the SFA to submit with the renewal documents a copy of the initial solicitation documents and contract checklist with notations and an indication of the basis for the renewal.

**Contract amendments**—All amendments must be documented, reviewed, and approved by the State agency prior to execution 2 CFR 210.16(a)(10). Additionally, the State agency must review and obtain awarding agency approval for all proposed contract modification changes when the scope of a contract or the change increases the contract amount by more than the Simplified Acquisition Threshold (Federal \$150,000). [2 CFR 200.324(b)(5)]

**Overly responsive** – The State agency review of responses must include a review of the product(s) and or service(s) requested in the solicitation to determine if the response was reflective of the product(s) and or service(s) requested or if the response may be overly-responsive and therefore unallowable.

**Value-Added responses** – under a RFP when the SFA requests FSMCs respond with goods and services using general terms rather than specifically defining their expectations, the State

agency must determine if the FSMC response includes unallowable cost provisions. Revenues from the nonprofit food service account are to be used only for the operation or improvement of the food service.

## On-Site Review

The most effective means of determining whether the SFA is meeting its responsibilities in the management of the Program(s) and if the FSMC is adhering to the terms and conditions of the contract is to assess Program operations. Evaluating Program operations allows the State agency to ensure that the SFA and the FSMC are complying with the contract and all other applicable Federal, State and local rules and regulations.

State agencies are required to perform an on-site review of **each** SFA contracting with an FSMC at least once during each five-year period. Such reviews must include an assessment of the SFA's monitoring of the food service operation through periodic on-site visits. [7 CFR 210.16(a)(3)] Specifically, the State agency must determine whether:

**SFA Responsibilities**—the SFA is meeting its responsibilities in the management of the Program.

**FSMC Responsibilities**—the FSMC is adhering to the terms and conditions of the contract.

## Timing

State agencies are encouraged to conduct the SFA/FSMC review in conjunction with the Administrative Review as addressed in section 210.18. If the review is conducted independently, it is recommended that a civil rights review also be included.

It is also strongly suggested that, regardless of the Administrative Review cycle, State agencies formally or informally review each SFA that has contracted with an FSMC during the first or base year of the contract.

## SFA Responsibilities

To test compliance with applicable Program requirements, State agencies must evaluate by the most appropriate means possible, whether the SFA is meeting its responsibilities in the areas identified below:

**Solicitation and Contract Documents**—the SFA retains the responsibility for preparing all solicitation and contract documents for the acquisition of an FSMC. These documents include, but are not limited to, bid specifications; the IFB or RFP; the terms, conditions, and required contract provisions; and any contract amendments. This includes ensuring that all cost-reimbursable solicitation and contract documents contain the required provisions from applicable program requirements, 250 Subpart E, and Appendix II of 2 CFR Part 200, including a provision ensuring the return of rebates, discounts, and applicable credits to the SFA.

NOTE: Contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such

procurements. [2 CFR 200.319(a)] While not recommended, an SFA may invite the successful recipient under a RFP to assist in finalizing the contract provisions after the successful recipient has been identified, however the FSMC should not write the finalized contract provisions for the SFA. Further, changes must not result in a material change to either the solicitation or contract.

**FSMC Selection**—the State agency must look closely at the SFA's procedure for soliciting and selecting the FSMC. NOTE: The State agency must evaluate whether the SFA complied with applicable procurement standards in the selection of an FSMC, i.e., review the SFA's procurement practices to ensure that they are adequate and in conformance with procurement standards.

**Procurement by sealed bid**—2 CFR 200.320(c) requires the State agency to ensure:

**Number of Bids Solicited**—the SFA publicly solicited bids from an adequate number of known suppliers, the IFB was publicly advertised in the case of local and tribal governments, and sufficient response time was provided prior to the date set for opening of bids.

**Clearly Defined Services**—the IFB, will include specifications and pertinent attachments, clearly defining the goods or services needed. Solicitations must incorporate a clear and accurate description of technical requirements for the material, product or service to be procured. Detailed product specifications should be avoided if at all possible. The solicitation should also identify all requirements which the bidders must fulfill and all other factors to be used in evaluating the bid. [2 CFR 200.319(c)]

This may include historical information on the type and value of non-program foods and meals to be offered such as other food service operations, for example, catering. When the FSMC will be responsible for providing the SFA with, or calculating non-program food costs and program revenues for compliance with the 7 CFR 210.14(f), the contract must clearly identify this in the scope.

- For fixed-price per meal contracts, the SFA must have, and the FSMC must provide, the information on product cost and revenues generated from the sale of non-program foods for the State agency to confirm the SFA is in compliance with this requirement. The information must include food cost of reimbursable meals, food cost from non-program foods, revenue from non-program foods and total revenue.

**Public Opening**—all bids will be opened at the time and place prescribed in the IFB, and for local and tribal governments, the bids must be opened publicly.

**Sealed Bids**—only sealed bids were accepted. If the State agency is not present at bid opening, the State agency must establish whether safeguards exist to protect bids prior to bid opening.

**Unresponsive Bids Rejected**—all unresponsive, inadequate, or unsealed bids must be rejected. Documentation must exist for the rejection thereof.

**Contract Award**—a firm fixed price contract, or fixed-price with economic price adjustment tied to a standard index, will be made to the responsible bidder whose bid, conforming to the IFB, was lowest, unless there are sound documented business reasons to reject any or all bids.

**Procurement by competitive negotiation**—2 CFR 200.320(d) requires the State agency to ensure:

**Number of Proposals Solicited**—proposals were solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The RFP identified all significant evaluation factors, including price or cost as the primary factor and the relative importance of each criterion was evaluated as stated in the solicitation. The RFP was publicized and reasonable requests by other sources to compete were honored to the maximum extent practicable.

**Technical Evaluation**—the SFA has a written method for conducting technical evaluations of the proposals received and for selecting recipients

**Awards**—award was made to the responsible party whose proposal was most advantageous to the SFA, price and other factors considered; price must be the primary factor.

**Conformance with Agreement**—the SFA ensures that the food service is operated in conformance with the SFA's agreement under the Program including all Programs to be operated, and that responsibility for all contractual agreements entered into in connection with the school nutrition Programs rests with the SFA.

**Monitoring Responsibilities**—the SFA monitors the food service operation through periodic on-site visits to ensure that the food service is in conformance with Program regulations (7 CFR 210.16(a)(3)). This includes monitoring contract terms and conditions; discounts, rebates, and credits are returned to the nonprofit food service account (cost-reimbursable contracts); USDA Foods are credited to the nonprofit food service account; USDA Foods inventories are being drawn down; and Program review and audit findings are resolved.

The SFA has contract performance management procedures in place to monitor the FSMC's compliance with the contract and the SFA maintains documentation of its monitoring, return of discounts, rebates, and credits, if applicable; for USDA Foods (fixed-price and cost-reimbursable contracts); any corrective action required, and whether corrective action was implemented.

**Control of Food Service**—while the SFA may want to consider FSMC recommendations,



the SFA retains control of the quality, extent and general nature of its food service and the prices to be charged to the children for meals (7 CFR 210.16(a)(4)), i.e.:

- The SFA retains control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs.
- The SFA establishes prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food service including vending machine items, and adult meals, as applicable).
- The SFA develops the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR 210, 220, and other Programs, if applicable. If the SFA is unable to develop a 21-Day cycle menu, the State agency may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation and the menu is developed in compliance with the meal pattern for all Programs operated (see meal pattern requirements for NSLP (7 CFR 210.10), SBP (7 CFR 220.8), SFSP (7 CFR 225.16), and CACFP (7 CFR 226.20)). The State agency should ensure that the SFA's solicitation contains information on how the SFA will be evaluating the FSMC's menu, to include compliance with the meal pattern for components and quantity, and dietary specifications, affordability, nutrition requirements, and appeal to the students. The solicitation must also identify general specifications for all products and services the FSMC is expected to provide when the FSMC provides procurement services. The FSMC must respond directly to the food specifications provided by the SFA in the solicitation. Further, the food service management company must adhere to the cycle for the first 21 days of meal service; any changes thereafter may be made with the approval of the school food authority (7 CFR 210.16(b)(1)).
- In case the SFA fails to provide specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation.
- The SFA conveys menu adjustment requirements to the FSMC and monitors implementation of those adjustments (e.g., meal pattern changes issued by USDA).

**Signature Authority**—the SFA retains signature authority on the agreement to participate in the NSLP, the SBP, and the SMP, including the SFA's free and reduced price policy statement and the monthly Claim for Reimbursement.

**Free and Reduced Price Meal Process**—the SFA is responsible for implementation of free and reduced price policy in accordance with 7 CFR 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and reduced price meals. An employee of the FSMC may perform for the SFA in

various aspects of the application, certification, and verification process of eligibility for school meals programs. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA.

**USDA Foods**—the SFA retains title to USDA Foods. The SFA ensures that all USDA Foods received by the SFA and made available to the FSMC, including processed USDA Foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. This provision also applies to any refunds received from processors (State agencies should consult with the State Distributing Agency, if different from the State agency that oversees Child Nutrition Programs, to review USDA Foods guidance issued). Specifically, the State agency should:

- Evaluate the amount and kind of USDA Food offered versus accepted to determine if the SFA/FSMC is using USDA Foods to the maximum extent in quantities that can be used and stored without waste.
- Evaluate the utilization of the USDA Food by the FSMC. Under cost-based contracts, this may include a review of production records and food cost documentation.
- Determine the existence of the proper value-pass-through for USDA entitlement and bonus USDA Foods, including processed end products made from USDA Foods, e.g., credits or reductions on the invoice in the month of utilization. The State Distributing agency will be able to provide information on the value of USDA Foods, including those contained in end products obtained through State processing agreements.
- Ensure that, in accordance with 7 CFR 250.51(a), the FSMC credits 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. Such requirement includes crediting for the value of USDA Foods contained in processed end products if the FSMC, in accordance with its contract, procures such end products on behalf of the SFA, or acts as an intermediary in passing the USDA Food value in such end products on to the SFA.
- Also ensure that, in accordance with 7 CFR 250.51(b), the FSMC credits the SFA for the value of all USDA Foods received for use in the SFA's meal service at least on an annual basis. All forms of crediting must include clear documentation of the value received from the USDA Foods. In cost-reimbursable contracts, 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 accordance with 7 CFR 250.51(c), ensure that, in crediting the SFA for the value of USDA Foods, the FSMC uses the USDA Food values determined by the distributing agency, in accordance with 7 CFR 250.58(e), or, if approved by the State distributing agency, USDA Food values determined by an alternate means of the SFA's choosing.

- Guarantee that, in accordance with 7 CFR 250.51(d), the FSMC must use all USDA Foods ground beef, ground pork, and all processed end products, in the SFA's food service, and must use all other USDA Foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the USDA Foods, in the SFA's food service (unless the contract specifically stipulates that the USDA Foods, and not such commercial substitutes, must be used).
- Instruct the SFA and FSMC to maintain records of receipt of USDA Foods and processed end products, of crediting for the value of USDA Foods, and other records relating to USDA Foods, in accordance with 7 CFR 250.54. The State agency must ensure that the SFA 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 year, including, in accordance with requirements in 7 CFR 250.51(a), the value of USDA Foods contained in processed end products.
- In accordance with 7 CFR 250.52(c), when a contract terminates, and is not extended or renewed, instruct the State agency to ensure that the FSMC return all unused USDA Foods ground beef, ground pork, and processed end products. Additionally, the FSMC must, at the SFA's discretion, return other unused USDA Foods.
- That the SFA checks that the FSMC has credited it for the value of all USDA Foods received for use in the SFA's food service in the school year.
- Check that the FSMC meets the general requirements for the storage and inventory management of USDA Foods in 7 CFR 250.14(b). In accordance with 7 CFR 250.52(a), the FSMC may store and inventory USDA Foods together with foods it has purchased commercially for the SFA's use, unless this is specifically prohibited in its contract. It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of USDA Foods in 7 CFR 250.51(d). Additionally, under cost-reimbursable contracts, the FSMC must ensure that its system of inventory management does not result in the SFA being charged for USDA Foods.
- If the FSMC is to competitively procure processing of USDA Foods into further processed end-products, this service must be specifically identified in the original solicitation and contract issued by the SFA.

**Health Certification**—the SFA maintains applicable health certifications and assures that all State and local regulations are being met by an FSMC preparing or serving meals at an SFA facility.

**Advisory Board**—the SFA establishes and operates an advisory board composed of parents, teachers and students to assist in menu planning. Documentation exists to support advisory board activities.

**21-Day Cycle Menu**—the SFA develops the 21-day cycle menu for the FSMC bid/proposal. “A school food authority with no capability to prepare a cycle menu may, with State agency approval, require that each food service management company include a 21-day cycle menu,” as long as doing so was a requirement of the original solicitation and the menus are developed in compliance with the meal pattern for all Programs operated. [7 CFR 210.16(b)(1)] The State agency should ensure that the SFA’s solicitation contains information on how the SFA will be evaluating the FSMC’s menu, such as compliance with the meal pattern components, quantity, and dietary specifications, affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

Further, an SFA may not contract an FSMC to develop their menu for use in the SFA’s solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA may approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

**Internal Controls**—the SFA conducts the monthly Claim for Reimbursement internal controls required in 7 CFR 210.8(a).

**Reports**—the SFA completes all reports, as required by the State agency.

## FSMC Responsibilities

State agencies must evaluate whether the FSMC meets the terms and conditions of the contract, and complies with the FSMC-specific provisions of applicable program regulations, as applicable.

The FSMC-specific provisions of 7 CFR 210.16 are:

**Meal Pattern**—the FSMC adheres to the cycle menu for the first 21 days of meal service and receives SFA approval for any changes to the cycle menu made thereafter [210.16(b)(1)].

**Reports and Records**—the FSMC maintains records to support the Claim for Reimbursement and reports claim information to the SFA promptly at the end of each month [210.16(c)(1)]. The FSMC must also retain:

- Cost records, including but not limited to source documentation, supporting charges for contractually approved costs (i.e., reasonable and necessary) for cost-based contracts; cost breakdown of management and administrative fees, if applicable, to demonstrate there is no double billing of charges; time and attendance records for labor costs billed, if

applicable; and breakdown of special function costs, if applicable.

- Meal count records for meals not covered by the Claim for Reimbursement, e.g., adult meals and other non-program meals.
- Revenue records broken down by source, type and category of meal or food service, e.g., a la carte sales, reduced price and full price NSLP and SBP meals, and non-program foods revenues and expenditures to ensure the non-program revenue exceeds the expenditures for non-program foods as outlined in 7 CFR 210.14(f)(2).
- The FSMC must have and maintain State or local health certification for any facility outside the school in which it proposes to prepare meals for the duration of the contract.

## Chapter 5: Technical Assistance and Training

### Technical Assistance

Technical assistance relating to FSMCs should be provided by the State agency to any SFA upon request. Such assistance may include, but is not limited to:

**Visits to Schools**—school visits offer State agency personnel an informal opportunity to provide training, offer suggestions, and provide clarification of Program requirements.

**Prototype Contracts**—a prototype FSMC contract developed and issued by the State agency maximizes the efficiency in the State agency's contract review efforts and seeks to ensure that all required provisions are present. State agencies, in conjunction with their legal counsel, may want to consider developing standard prototype contracts and IFBs or RFPs for use by all SFAs. These documents should be mandated for all SFAs contracting with FSMCs.

**Core Prototype Provisions**—in lieu of a State agency-developed prototype contract, State agencies may want to develop core contract provisions or require all SFAs to develop core contract provisions. Once approved, only changes to the core contract provisions (plus all non-core provisions) would need to be reviewed in subsequent years, unless amendments to the contract are made which do not create a material change.

**Conflicts:** In the event of a conflict between or among any of the terms of the contract, such conflicts shall be resolved by referring to contract documents in the following order of priority: SFA's request for proposals or invitation for bids; followed by FSMC proposal documents; followed by a contract. No modification or amendment to a contract shall become valid unless it is made in writing, approved by the State agency and signed by all parties.

**State agency Contract Guidelines**—if the State agency does not develop a prototype contract, SFAs should be encouraged to develop their own standard contracts following State agency guidelines.

**Specification Development**—the State agency should be able to assist in specification development, either by prototype specifications or guidelines. The State agency should review specifications when requested by the SFA.

### Training

The State agency should conduct training sessions on a regular basis to ensure that SFA personnel and FSMC representatives are provided with up-to-date information regarding Program changes and/or changes in the contracting process, e.g., when a new provision is included in the prototype contract. Such training sessions will provide participating personnel with the opportunity to share information and insight.

## Appendix A: Program Regulations

### **Food Service Management Company contracts. [7 CFR 210.16]**

(a) General. Any school food authority (including any State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable lunches to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

- (1) Adhere to the procurement standards specified in 7 CFR 210.21 when contracting with the food service management company;
- (2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;
- (3) Monitor the food service operation through periodic on-site visits;
- (4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;
- (5) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;
- (6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;
- (7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility;
- (8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning;
- (9) Obtain written approval of invitations for bids and requests for proposals before their issuance when required by the State agency. The school food authority must incorporate all State agency required changes to its solicitation documents before issuing those documents; and
- (10) Ensure that the State agency has reviewed and approved the contract terms and that the school food authority has incorporated all State agency required changes into the contract or amendment before any contract or amendment to an existing food service management company contract is executed. Any changes made by the school food authority or a food service management company to a State agency pre-approved prototype contract or State agency approved contract term must be approved in writing by the State agency before the contract is executed. When requested, the school

food authority must submit all procurement documents, including responses submitted by potential contractors, to the State agency, by the due date established by the State agency.

(b) Invitation to bid. In addition to adhering to the procurement standards under 7 CFR 210.21, school food authorities contracting with food service management companies shall ensure that:

(1) The invitation to bid or request for proposal contains a 21-day cycle menu developed in accordance with the provisions of 7 CFR 210.10, to be used as a standard for the purpose of basing bids or estimating average cost per meal. A school food authority with no capability to prepare a cycle menu may, with State agency approval, require that each food service management company include a 21-day cycle menu, developed in accordance with the provisions of 7 CFR 210.10, with its bid or proposal. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority.

(2) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in 7 CFR 210.21.

(c) Contracts. Contracts that permit all income and expenses to accrue to the food service management company and “cost-plus-a-percentage-of-cost” and “cost-plus-a-percentage-of-income” contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following:

(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in accordance with 7 CFR 210.23(c).

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

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in 7 CFR 210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

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



## **Program regulations for procurement [7 CFR 210.21]**

Required contract provisions for all contracts where the FSMC is providing purchasing services involving food (fixed-price contracts based on a fixed meal price and cost-reimbursable contracts that include purchasing services for Program foods).

### **Buy American [7 CFR 210.21(d)]**

(1) Definition of domestic commodity or product. In this paragraph (d), the term ‘domestic commodity or product’ means—

- (i) An agricultural commodity that is produced in the United States; and
- (ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

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

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

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

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

(3) Applicability to Hawaii. Paragraph (d)(2)(i) of this section shall apply to a school food authority in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school lunch program under this part.

### **Geographic preference, if this option is elected by the SFA [7 CFR 210.21(g)]**

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

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

more types of vegetables or fruits in a single package); the addition of ascorbic acid or other preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning fish; and the pasteurization of milk.

**Contract provisions for cost reimbursable contracts only [7 CFR 210.21(f)]**

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

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

(ii)(A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account); or

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

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

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

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

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

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

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

### 250.50 Contract requirements and procurement.

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

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

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

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

- (1) Preparing and serving meals;
- (2) Ordering or selection of donated foods, in coordination with the recipient agency, and in accordance with §250.58(a);
- (3) Storage and inventory management of donated foods, in accordance with §250.52; and
- (4) Payment of processing fees or submittal of refund requests to a processor on behalf of the recipient agency, or remittance of refunds for the value of donated foods in processed end products to the recipient agency, in accordance with the requirements in subpart C of this part.

### **250.51 Crediting for, and use of, donated foods.**

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

- (1) Procure processed end products on behalf of the recipient agency; or
- (2) Act as an intermediary in passing the donated food value in processed end products on to the recipient agency.

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

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

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

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

#### **250.52 Storage and inventory management of donated foods.**

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

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

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

#### **250.53 Contract provisions.**

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

- (1) A statement that the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in the school year or fiscal year (including both entitlement and bonus foods), and including the value of donated foods contained in processed end products, in accordance with the contingencies in §250.51(a);
  - (2) The method and frequency by which crediting will occur, and the means of documentation to be utilized to verify that the value of all donated foods has been credited;
  - (3) The method of determining the donated food values to be used in crediting, in accordance with §250.51(c), or the actual donated food values;
  - (4) Any activities relating to donated foods that the food service management company will be responsible for, in accordance with §250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR 250;
  - (5) A statement that the food service management company will use all donated ground beef and ground pork products, and all processed end products, in the recipient agency's food service;
  - (6) A statement that the food service management company will use all other donated foods, or will use commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service;
  - (7) Assurance that the procurement of processed end products on behalf of the recipient agency, as applicable, will ensure compliance with the requirements in subpart C of 7 CFR 250 and with the provisions of distributing or recipient agency processing agreements, and will ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value;
  - (8) Assurance that the food service management company will not itself enter into the processing agreement with the processor required in subpart C of 7 CFR 250;
  - (9) Assurance that the food service management company will comply with the storage and inventory requirements for donated foods;
  - (10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the food service management company's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods;
  - (11) A statement that the food service management company will maintain records to document its compliance with requirements relating to donated foods, in accordance with §250.54(b); and
  - (12) A statement that extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to donated foods.
- (b) Required contract provisions in cost-reimbursable contracts. A cost-reimbursable contract must

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

#### **250.54 Recordkeeping and reviews.**

(a) Recordkeeping requirements for the recipient agency. The recipient agency must maintain the following records relating to the use of donated foods in its contract with the food service management company:

- (1) The donated foods and processed end products received and provided to the food service management company for use in the recipient agency's food service;
- (2) Documentation that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products; and
- (3) The actual donated food values used in crediting.

(b) Recordkeeping requirements for the food service management company. The food service management company must maintain the following records relating to the use of donated foods in its contract with the recipient agency:

- (1) The donated foods and processed end products received from, or on behalf of, the recipient agency, for use in the recipient agency's food service;
- (2) Documentation that it has credited the recipient agency for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products; and
- (3) Documentation of its procurement of processed end products on behalf of the recipient agency, as applicable.

(c) Review requirements for the recipient agency. The recipient agency must ensure that the food service management company is in compliance with the requirements of this part through its monitoring of the food service operation, as required in 7 CFR 210, 225, or 226, as applicable. The recipient agency must also conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products.

(d) Departmental reviews of food service management companies. The Department may conduct reviews of food service management company operations, as necessary, to ensure compliance with

the requirements of this part with respect to the use and management of donated foods.

### Value-pass through methods

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

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

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

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

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

**NET OFF INVOICE (NOI):** permits a distributor to request, or receive, such compensation through its electronic sales velocity reports, or other automated sales reports, which also serve to notify the processor of end product sales. Once such sales reports are received, the processor can report end product sales and inventory reductions



of donated foods to the State distributing agency (SDA) in its monthly performance reports. The processor and the distributor must work out the logistics of compensating the distributor for the donated food value. Processed end products can only be sold at a discount if the processor has an approved end product data schedule and the end product has been approved by the SDA. Before a processor is allowed to draw down inventory, it must verify that the customer is an eligible recipient agency. *See id.*

#### **REBATE SYSTEM:**

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

#### **2 CFR 200.318-326**

##### **Recommended language:**

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

#### **2 CFR 200.319**

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

##### **Prohibited restrictions to competition:**

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

Prohibited language of State requirements on geographic preference:

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

##### **Required:**

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

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

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

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

- (1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;
- (2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- (3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;
- (4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- (5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

## **2 CFR 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

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

In addition to other provisions required by Program regulations, State, or local agencies, all contracts made under the Federal award must contain provisions covering the following, as applicable.

- (A) Contracts for **more than the simplified acquisition threshold currently set at \$150,000**, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
- (B) All contracts in **excess of \$10,000** must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.
- (C) **Equal Employment Opportunity.** Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60-1.3

must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

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

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

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

regulations issued by the awarding agency.

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

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

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

## Appendix B: Policy Guidance on Procurement Topics

- SP 24-2016, Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program, dated February 3, 2016,  
<http://www.fns.usda.gov/sites/default/files/cn/SP24-2016os.pdf>
- SP 12-2016, CACFP 05-2016, SFSP 09-2016, Guidance on Competitive Procurement Standards for Program Operators, dated November 13, 2015;  
[http://www.fns.usda.gov/sites/default/files/cn/SP12\\_CACFP05\\_SFSP09-2016os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP12_CACFP05_SFSP09-2016os.pdf)
- SP 07-2016, SFSP 07-2016, Local Foods and Related Activities in Summer Meal Programs, with Questions and Answers, dated November 12, 2015;  
[http://www.fns.usda.gov/sites/default/files/SP07\\_SFSP07-2016os.pdf](http://www.fns.usda.gov/sites/default/files/SP07_SFSP07-2016os.pdf)
- SP 04-2016, CACFP 04-2016, SFSP 04-2016, Local Agency Procurement Reviews School Year 2015-2016, dated November 9, 2015;  
[http://www.fns.usda.gov/sites/default/files/cn/SP04\\_CACFP04\\_SFSP04-2016os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP04_CACFP04_SFSP04-2016os.pdf)
- SP 03-2016, CACFP 03-2016, SFSP03-2016, Procurement Standards and Resource Management Requirements related to Franchise Agreements, dated November 6, 2015;  
[http://www.fns.usda.gov/sites/default/files/SP03\\_CACFP03\\_SFSP03-2016os.pdf](http://www.fns.usda.gov/sites/default/files/SP03_CACFP03_SFSP03-2016os.pdf)
- SP02-2016, CACFP 02-2016, SFSP 02-2016, Questions and Answers on the Transition to and Implementation of 2 CFR Part 200, dated October 30, 2015;  
[http://www.fns.usda.gov/sites/default/files/SP02\\_CACFP02\\_SFSP02-2016os.pdf](http://www.fns.usda.gov/sites/default/files/SP02_CACFP02_SFSP02-2016os.pdf)
- SP 01-2016, CACFP 01-2016, SFSP 01-2016, Procuring Local Meat, Poultry, Game, and Eggs for Child Nutrition Programs, dated October 22, 2015  
[http://www.fns.usda.gov/sites/default/files/cn/SP01\\_CACFP%2001\\_SFSP01-2016os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP01_CACFP%2001_SFSP01-2016os.pdf)
- SP 11-2015(v2) CACFP 10-2015 SFSP 13-2015, CN Labels Copied with a Watermark Acceptable Documentation, dated, March 11, 2015;  
[http://www.fns.usda.gov/sites/default/files/cn/SP11v2\\_CACFP10\\_SFSP13-2015os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP11v2_CACFP10_SFSP13-2015os.pdf)
- SP 30-2015, SFSP 18-2015, CACFP 16-2015, Office of Management and Budget Super-Circular - 2 CFR Part 200, dated March 18, 2015;  
[http://www.fns.usda.gov/sites/default/files/cn/SP30\\_CACFP16\\_SFSP18-2015os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP30_CACFP16_SFSP18-2015os.pdf)
- SP 11-2015(v2) CACFP 10-2015 SFSP 13-2015, CN Labels Copied with a Watermark Acceptable Documentation, dated March 11, 2015;  
[http://www.fns.usda.gov/sites/default/files/cn/SP11v2\\_CACFP10\\_SFSP13-2015os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP11v2_CACFP10_SFSP13-2015os.pdf)
- CACFP 11-2015, Local Foods in the Child and Adult Care Food Program, dated March 13, 2015;  
<http://www.fns.usda.gov/local-foods-child-and-adult-care-food-program>
- SP 09-2015, CACFP 03-2015, SFSP 02-2015, Written Codes of Conduct and Performance of Employees Engaged in Award and Administration of Contract, dated November 21, 2014;

[http://www.fns.usda.gov/sites/default/files/cn/SP09\\_CACFP%2003\\_SFSP02-2015os.pdf](http://www.fns.usda.gov/sites/default/files/cn/SP09_CACFP%2003_SFSP02-2015os.pdf)

- SP 06-2015, Farm to School and School Garden Expenses, dated November 12, 2014;  
<http://www.fns.usda.gov/farm-school-and-school-garden-expenses>
- SP 01-2013 CACFP 01-2013 SFSP 01-2013, Federal Small Purchase Threshold Adjustment, dated October 2, 2012 and attachment;  
[http://www.fns.usda.gov/sites/default/files/SP01\\_CACFP01\\_SFSP01-2013os.pdf](http://www.fns.usda.gov/sites/default/files/SP01_CACFP01_SFSP01-2013os.pdf)  
<http://www.fns.usda.gov/sites/default/files/SP01-2013a.pdf> (attachment)
- SP 23-2013, Guidance Reaffirming the Requirement that State agencies and School Food Authorities Periodically Review Food Service Management Company Cost Reimbursable Contracts and Contracts Associated with USDA Foods, dated February 12, 2013;  
<http://www.fns.usda.gov/sites/default/files/SP23-2013os.pdf>
- SP 03-2013, CACFP 02-2013, SFSP 02-2013, Procurement Geographic Preference Q&As – Part II, dated October 9, 2012;  
[http://www.fns.usda.gov/sites/default/files/SP03\\_CACFP02\\_SFSP02-2013os.pdf](http://www.fns.usda.gov/sites/default/files/SP03_CACFP02_SFSP02-2013os.pdf)
- SP 01-2013 CACFP 01-2013 SFSP 01-2013, Federal Small Purchase Threshold Adjustment, dated October 2, 2012;  
[http://www.fns.usda.gov/sites/default/files/SP01\\_CACFP01\\_SFSP01-2013os.pdf](http://www.fns.usda.gov/sites/default/files/SP01_CACFP01_SFSP01-2013os.pdf)
- SP35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, dated June 12, 2012;  
<http://www.fns.usda.gov/sites/default/files/SP35-2012os%20.pdf>
- SP 19-2012, Soliciting Bids from Commercial Distributors for End Product, dated February 24, 2012 and attachment;  
<http://www.fns.usda.gov/sites/default/files/SP19-2012os.pdf>  
[http://www.fns.usda.gov/sites/default/files/SP19-2012\\_FD119.pdf](http://www.fns.usda.gov/sites/default/files/SP19-2012_FD119.pdf) (attachment)
- SP 17-2012, Procurement Questions and Answers to Assist in the Implementation of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Programs, dated February 23, 2012; <http://www.fns.usda.gov/sites/default/files/SP17-2012os.pdf>
- SP 14-2012, Procurement Questions Relevant to the Buy American Provision, February 13, 2012;  
<http://www.fns.usda.gov/sites/default/files/SP14-2012os.pdf>
- SP 41 – 2011, Child Nutrition Reauthorization 2010: Indirect Cost Guidance, dated July 7, 2011 and attachment; [http://www.fns.usda.gov/sites/default/files/SP41-2011\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP41-2011_os.pdf)  
<http://www.fns.usda.gov/sites/default/files/SP41-2011a.pdf> (attachment)
- SP\_18 – 2011, Procurement Geographic Preference Q&As, dated February 1, 2011;  
[http://www.fns.usda.gov/sites/default/files/SP18-2011\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP18-2011_os.pdf)
- SP 08-2010 CACFP 05-2010 SFSP 06-2010, Geographic Preference for the Procurement of Unprocessed Agricultural Products in the Child Nutrition Programs, dated November 13, 2009;

[http://www.fns.usda.gov/sites/default/files/SP\\_08\\_CACFP\\_05\\_SFSP\\_06-2010\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_08_CACFP_05_SFSP_06-2010_os.pdf)

- SP 01-2010, CACFP 01-2010 SFSP 01-2010, Applying Geographic Preferences in Procurements for the Child Nutrition Programs – Updates, dated October 9, 2009;  
[http://www.fns.usda.gov/sites/default/files/SP\\_01-2010\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_01-2010_os.pdf)
- SP 28-2009, Procurement Questions, dated July 22, 2009;  
[http://www.fns.usda.gov/sites/default/files/SP\\_28-2009\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_28-2009_os.pdf)
- SP 10-2009, Economic Price Adjustments in Vendor Contracts, dated January 23, 2009;  
[http://www.fns.usda.gov/sites/default/files/SP\\_10-2009\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_10-2009_os.pdf)
- SP 09-2009, Competitive Procurement and Private Grants for School Food Programs, dated January 15, 2009; [http://www.fns.usda.gov/sites/default/files/SP\\_09-2009\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_09-2009_os.pdf)
- SP 07-2009, Reminder: Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, dated January 9, 2009;  
[http://www.fns.usda.gov/sites/default/files/SP\\_07-2009\\_os.pdf](http://www.fns.usda.gov/sites/default/files/SP_07-2009_os.pdf)
- SP 30-2008, Applying Geographic Preferences in Procurements for the Child Nutrition Programs, dated July 9, 2008; [http://www.fns.usda.gov/sites/default/files/SP\\_30-2008.pdf](http://www.fns.usda.gov/sites/default/files/SP_30-2008.pdf)
- SP 21-2008, Prototype Language for Return of Discounts, Rebates and Credits to School Food Authorities, dated May 1, 2008; [http://www.fns.usda.gov/sites/default/files/SP\\_21-2008.pdf](http://www.fns.usda.gov/sites/default/files/SP_21-2008.pdf)
- SP 15-2008, Allowability of Procurement Fees in School Food Authority (SFA) Contract, dated March 12, 2008; [http://www.fns.usda.gov/sites/default/files/SP\\_15-2008-OS.pdf](http://www.fns.usda.gov/sites/default/files/SP_15-2008-OS.pdf)
- SP 09-2008, Final Rule, Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, dated January 28, 2008;  
[http://www.fns.usda.gov/sites/default/files/SP\\_09-2008-OS.pdf](http://www.fns.usda.gov/sites/default/files/SP_09-2008-OS.pdf)
- SP 02-2007, School Districts and Federal Procurement Regulations, dated January 23, 2007;  
[http://www.fns.usda.gov/sites/default/files/SP\\_02-2007.pdf](http://www.fns.usda.gov/sites/default/files/SP_02-2007.pdf)
- SP 29-2006, Buy American Reminder, August 9, 2006;  
[http://www.fns.usda.gov/sites/default/files/SP\\_29-2006.pdf](http://www.fns.usda.gov/sites/default/files/SP_29-2006.pdf)
- SP 19-2006, April 2006 Procurement Questions, dated April 25, 2006;  
[http://www.fns.usda.gov/sites/default/files/SP\\_19-2006.pdf](http://www.fns.usda.gov/sites/default/files/SP_19-2006.pdf)
- SP 20-2006, Procurement Questions Relevant to the Buy American Provision, dated April 17, 2006; [http://www.fns.usda.gov/sites/default/files/SP\\_20-2006.pdf](http://www.fns.usda.gov/sites/default/files/SP_20-2006.pdf)

### **Food Distribution Memoranda**

- FD-023: National School Lunch Program (NSLP): Accounting for Donated Foods in Cost-Reimbursable Contracts Between School Food Authorities and Food Service Management

Companies, dated February 25, 2004;

[http://www.fns.usda.gov/sites/default/files/pmfd023\\_NSLP-FsmcContracts\\_0.pdf](http://www.fns.usda.gov/sites/default/files/pmfd023_NSLP-FsmcContracts_0.pdf)

- See FD-040: State Processing, *Commodity Inventory Reduction at Further Processors*, dated January 12, 2005.
  
- FD-080: National School Lunch Program (NSLP), Summer Food Service Program (SFSP), and Child and Adult Care Food Program (CACFP) Guidance in Crediting for, and Use of, Donated Foods in Contracts with Food Service Management Companies, dated January 25, 2011;  
[http://www.fns.usda.gov/sites/default/files/pmfd080rev\\_NSLP-SFSP-CACFP\\_DonatedFoodswithFSMCsJan2011.pdf](http://www.fns.usda.gov/sites/default/files/pmfd080rev_NSLP-SFSP-CACFP_DonatedFoodswithFSMCsJan2011.pdf)
  
- FD-110: National School Lunch Program (NSLP), Child and Adult Care Food Program (CACFP), and Summer Food Service Program (SFSP), Clarification in Crediting for, and Use of, Donated Foods in Contracts with Food Service Management Companies-First and Final Contract Years, dated January 25, 2011;  
[http://www.fns.usda.gov/sites/default/files/pmfd110\\_NSLP\\_CACFP\\_SFSP-CreditingDonatedFoodsrevJan2011.pdf](http://www.fns.usda.gov/sites/default/files/pmfd110_NSLP_CACFP_SFSP-CreditingDonatedFoodsrevJan2011.pdf)



**Appendix C: Sample Debarment and Suspension Form**  
*[State agency or Local Educational Agency]*

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**SAMPLE**

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

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

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

- (1) The prospective primary participant certifies to the best of its knowledge and belief that it and its principals:
- (a) Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
  - (b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
  - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
  - (d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.
- (2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective primary participant shall attach an explanation to this proposal.

Business Name \_\_\_\_\_

Date \_\_\_\_\_

By \_\_\_\_\_

Name and Title of Authorized Representative

\_\_\_\_\_  
Signature of Authorized Representative

## Appendix D: Certification Regarding Lobbying

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

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

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

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

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

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

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

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Name/Address of Organization

\_\_\_\_\_  
Name/Title of Submitting Official

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## Appendix E: Checklist for Review of Prototype and Executed FSMC Contracts

State agency Name	DATE:		
<b>Food Service Management Company Contracts</b>			
<b>STATE AGENCY INSTRUCTIONS:</b> Obtain copies of the prototype solicitation document and executed contracts. Evaluate compliance with Federal requirements for specifications, evaluation and scoring criteria, contract award for lowest/most advantageous bid/proposal, required contract provisions, presence of unallowable cost provisions, over-responsiveness, etc. Answer the questions below. Section A, B, and C may be answered during the review of the original contract solicited. Section D may be answered during the on-site review.			
Section A      Review of SA Prototype Solicitation/Contract Document	YES	NO	NA*
I. Does the FSMC contract include:			
a. Contract duration in 7 CFR 210.16(d)?			
b. SFA requirements in 7 CFR 210.16(a)(1-10)?			
c. Nonperformance provision with sanctions for violations in 7 CFR 210.16(b)(1)?			
d. Cost-plus- a- percentage of cost and cost-plus-a percentage of income contracts are prohibited. [Also in 2 CFR 200.323(d)]			
e. FSMC to maintain records to support SFA Claims for Reimbursement and available upon request? [7 CFR 210.16(c)(1)]			
f. Health certification for facilities operated [7 CFR 210.16(c)(2)].			
g. No payment for spoiled/unwholesome meals or noncompliance with meal pattern in 7 CFR 210.16(c)(3).			
h. If a cost-reimbursable contract, the required contract provisions in 2 CFR 210.21(f)(1)?			
i. Prohibited expenditures provision from 7 CFR 210.21(f)(2)?			
j. Buy American provision in 7 CFR 210.21(d) and 220.16(d)?			
k. Geographic preference option, if applicable, in 7 CFR 210.21(g)?			
l. Meal pattern requirements for:			
1. 7 CFR 210.10 and afterschool snack, as applicable			
2. 7 CFR 220.8, if applicable			
3. Other programs operated, as applicable (SFSP, CACFP, At-Risk)			
m. A 21-day cycle menu prepared by the SFA, or FSMC if approved by the State agency? [7 CFR 210.16(b)(1)]			
1. Compliance with the 21-day cycle menu for the first 21 days of meal service?			
n. Correct Civil Rights statement in FNS Instruction 113 Appendix B?			
o. Required contract provisions in 7 CFR 250.50-53 including:			
1. All activities related to USDA Foods [7 CFR 250.50(c-d)]?			
2. Crediting for, and use of, USDA Foods in 7 CFR 250.51(a-d)?			
3. Storage and inventory management of USDA Foods in 7 CFR 250.52?			
4. Contract provisions for fixed-price and cost-reimbursable contracts, as applicable in 7 CFR 250.53?			
5. Recordkeeping and review requirements in 7 CFR 250.54, as applicable?			
p. Necessary affirmative steps are taken to assure that small and minority businesses, women's business enterprises, and labor surplus area firms			

will be used when possible? [2 CFR 200.321]			
q. Contract provisions in Appendix II of 2 CFR 200:			
1. Contracts addresses administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate? (For contracts in excess of the Simplified Acquisition Threshold currently set at \$150,000) [2 CFR 200 Appendix II(A)]			
2. Termination for cause and for convenience clause included with the manner by which it will be effected and the basis for settlement? (For contracts in excess of \$10,000 only) [2 CFR 200 Appendix II(B)]			
3. Equal Employment Opportunity (all contracts that meet the definition of “federally assisted construction contract” and in excess of \$10,000)?			
4. Contract Work Hours/Safety Standards Act (40 U.S.C. 3701-3708) (in excess of \$100,000)?			
6. Davis Bacon Act (all prime construction contracts in excess of \$2,000)?			
7. Rights to Inventions Made Under a Contract or Agreement. (All applicable contracts)?			
8. Clean Air Act and the Federal Water Pollution Control Act (contracts and subgrants of amounts in excess of \$150,000)?			
9. Debarment and Suspension (Executive Orders 12549 and 12689)(2 CFR 200.213 and Appendix II to 2 CFR 200 (H) (All contracts))			
10. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) (Appendix II to 2 CFR 200 (I) (\$100,000 or more)			
r. State agency additional requirements, if applicable 7 CFR 210.19(e) (add in comments section below)			
<b>COMMENTS:</b>			
<b>Section B General FSMC Review for Executed SFA-FSMC Contracts</b>	<b>YES</b>	<b>NO</b>	<b>NA*</b>
I. If a SA prototype document is available, was this used without modification?			
a. If the prototype was modified, was prior written approval obtained from the State agency before it was issued?			
II. If the SA required a pre-issuance approval prior to the solicitation and changes were required, were these completed? [7 CFR 210.21(c)(1)]			
III. During the review of the original contract approval process (prior to execution), answer the questions in Section C below.			
<b>Section C State Agency Review of SFA Contracts (prior to approval for execution)</b>	<b>YES</b>	<b>NO</b>	<b>NA*</b>
I. Are all State agency prototype provisions required in Section A present?			
a. If no, in the comment section below, identify requirements that must be restored for approval by the State agency.			
<b>Comments, if applicable:</b>			
II. Obtain SFA solicitation documents to determine if full and open competition was achieved in compliance with all Federal regulations. Review the solicitation, evaluation and scoring criteria used for contract award to determine compliance.			
III. Were any unallowable cost items included in the contract? (Scholarships, gifts/gift cards, event tickets, grants, catering accounts, etc.)			

IV.	Were any overly responsive bids/proposals included in the contract?			
V.	<b>Based on the answers above is this contract eligible for SA approval?</b>			
VI.	<b>Renewal years:</b> Determine if in any renewal years there were <i>amendments</i> , rather than a <i>renewal</i> . If yes, compare all amendments to the original contract to determine if a material change was made. I.e., unallowable costs, the addition of equipment to be purchased by the FSMC (determine value and if State agency approval was obtained for items in excess of \$5,000,) etc. Add comments, if applicable.			
a.	<b>Renewal year #1</b>			
b.	<b>Renewal year #2</b>			
c.	<b>Renewal year #3</b>			
d.	<b>Renewal year #4</b>			
<b>Comments:</b>				
<b>Section D: State Agency On-Site Review of SFA-FSMC Contracts [7 CFR 210.19(a)(5)]</b>		<b>YES</b>	<b>NO</b>	<b>NA*</b>
I.	Review FSMC compliance with SFA-FSMC contract provisions in Section A of this checklist.			
a.	Is the SFA conducting periodic on-site monitoring required in 7 CFR 210.16(a)(3)? <i>Review documentation of on-site monitoring.</i>			
b.	Is the SFA ensuring the return of discounts, rebates, and credits? Obtain documentation to determine frequency and value returned to the NPFSA for: 1. <b>USDA Foods \$_____</b> 2. <b>Commercially purchased foods, if cost-reimbursable contract: \$_____</b>			
c.	Is the SFA ensuring the FSMC maintains health certifications in compliance with State and local healthy requirements?			
d.	Is the SFA ensuring the FSMC complies with Buy American as evidenced by foods stored in: 1. Dry storage: (review labels to determine product origin)			
II.	Refrigeration storage: (review labels to determine product origin)			
III.	Freezer storage: (review labels to determine product origin)			
IV.	Off-site storage, if applicable ((review labels to determine product origin)			
e.	Is the SFA is ensuring the FSMC uses USDA Foods to the maximum for meals?			
f.	Is the SFA ensuring the FSMC meals served are in compliance with the meal pattern in: 1. 7 CFR 210.10 (NSLP)? 2. 7 FR 220.8, if applicable? (SBP) 3. 7 CFR 226.20, if applicable? (CACFP) 4. Other programs operated (review menu planning, if applicable, and if review occurs during NSLP for follow-up in SFSP)			
g.	Is the SFA ensuring the FSMC complies with Civil Rights? 1. Have any Civil Rights violations been reported? If yes, review documentation. Have these been resolved?			
<b>COMMENTS:</b>				