

Food Service Management Companies (FSMCs)

Developing Solicitations and Contracts

7 CFR 210.16 for School Food Authorities and 7 CFR 210.19(a)(5) for State Agencies

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Good afternoon and welcome! This webinar provides an overview of the Guidance for School Food Authorities and State Agencies; Contracting with Food Service Management Companies, published in June 2016 and is presented now as this is the season for school food authorities to begin soliciting for these services. My name is Kirk Farquharson and I'm joined by Martine Cherry. Martine and I will be presenting and Sandra Foss will be supporting by responding to your questions.

We hope to have time to answer questions at the conclusion of the webinar. We also encourage you to send us your questions using the chat box on the bottom left hand corner of your screen as they arise and we will answer as many of them as we can during the webinar as possible. So let's get started!

For the purpose of this webinar, we will use the term "district, in place of the local educational authority or school food authority.

During this presentation, we will focus on considerations needed to be made when deciding to contract with a FSMC and on developing Solicitations and Contracts for the services of Food Service Management Companies (FSMCs). We will also briefly discuss the districts and State Agencies responsibilities in regards to contracting with FSMCs.

The program regulations that guide these responsibilities are found in 7 CFR 210.16 for School Districts and 7 CFR 210.19(a)(5) for State Agencies. Under their agreements with a State agency, Districts are responsible for operating the school nutrition programs in schools under their jurisdiction.

A district may contract with a food service management company (FSMC) to manage its food service operation; however, the district has the ultimate responsibility to monitor the terms of the contract. State agencies are required to ensure districts comply with State and Federal procurement standards and cost principles and applicable Federal Program regulations when entering into contracts with Food Service Management Companies. The child nutrition programs commonly operated by districts are the National School Lunch Program (NSLP) which may include Afterschool Snacks and/or the Seamless Summer Option (SSO), the School Breakfast Program (SBP), the Special Milk Program (SMP), Fresh Fruit and Vegetable Program (FFVP), the Food Distribution for child nutrition programs (FDP), the Summer Food Service Program (SFSP), and in some locations, the Child and Adult Care Food Program (CACFP) offering At-Risk Afterschool snacks or the At-Risk Supper.

What is required of the district?

Adhere to the Procurement Standards

Includes the Buy American provision

Solicitation, Contract Award and Monitoring

Ensure the FSMC performs according to the contract

Monitor via periodic
on-site visits

Control quality and
meal pricing

Retain signature
authority



Let's begin with what is required of the district when they decide to contract with a Food Service Management Company to operate the program. What does this entail? 7 CFR 210.16 lists the requirements, or must-dos, for the district when contracting with a Food Service Management Company.

First and foremost, the district remains responsible for Child Nutrition Program operations and **cannot** relinquish control of the Program to the company. The district must ensure that the food service program is operated in conformance with the district's agreement with the State agency. The responsibility for all contractual agreements entered into in connection with the Programs operated remains with the districts and the district must resolve findings resulting from Program reviews and audits.

When conducting the procurement, districts must ensure compliance with the Buy American Provision. The purchase of domestic foods is required for all agricultural commodities purchased for the National School Lunch Program. It is important that the solicitation, awarding criteria, and resulting contract adhere to this standard.

As you see on the slide, in addition to conducting compliant Procurement standards, districts must monitor contractor performance through periodic on-site visits, control the quality, nature, and price of the meals, and retain signature authority respective to free and reduced-price meal policies and claims. Monitoring via periodic on-site visits is essential for the district to ensure the program is operated in compliance with the program requirements and as contracted. This means visits that are unannounced, occur more than once per year, and are documented. And like all other aspects of procurement, the documentation

should confirm the visits were completed, the Program is operated as the district intended, and the district and contractor are complying with Program requirements.

When the district includes the quality standards and the nature of the food service it seeks; this helps ensure the district obtains the food service operation it desires. Does the district expect a simple, single menu plan with one meat, one vegetable, one fruit, one bread, and two varieties of milk, or does it expect many menu options similar to a food court design? Does this vary from elementary schools, middle schools, and high schools? Does the district expect Grade A quality foods or are Grade B or C foods acceptable? These quality and menu expectations need to be stated in the solicitation along with the district approved meal prices so all companies know how to prepare their bids/responses. Including these details clearly identifies the districts' expectations and potentially reduces the assumptions and conditions companies must address in their bids/responses.

What is Required of the district?

Full utilization of
USDA Foods

**Maintain health
certifications**

**Establish advisory
board**

**Obtain State agency review and approval of
contracts before execution**



Additional requirements are the full utilization of USDA foods, maintaining applicable health certifications, and the establishment of an advisory board.

The next two requirements of the district involve the State agency. First, if the State agency has a mandated prototype solicitation document and/or contract for the services of a Food Service Management Company, the district must obtain written approval from the State agency before any changes can be made to State agency mandated documents prior to publishing or executing the documents.

Following the solicitation, selection and awarding of a contract, the State Agency must review and approve the contract terms prior to the final execution of the contract. This means that before both parties – the district and the Food Service Management Company – sign the contract, the State agency must review and approve the contract. This approval includes all newly executed contracts, contract renewals, and amendments to food service management company contracts.

District Informed Decision Making

- Best for Food Service operation?
- Financial, administrative, and operational concerns
- Include provisions to safeguard the district and ensure food service is managed per regulations
- Knowledgeable staff needed

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Districts must make informed decisions when considering contracting with a Food Service Management Company. The district must determine if a company will provide the district with the best food service operation to meet its needs. To make this decision, the district should consider a number of issues. These issues include the financial, administrative and operational activities that will be affected by contracting this service. The district must allow time to identify and analyze these issues and to prepare for the conversion from self-operating the food service to using a Food Service Management Company. This process, including the competitive procurement process, may require one full year to complete before the Food Service Management Company can begin to manage the operations.

In order to adequately safeguard the School Food Service programs, the district must include provisions as well as ensure that the Food Service Management Company manages the food service in accordance with Child Nutrition Program regulations, the district-State agency agreement, and the objectives the district seeks to achieve.

To accomplish this, the district must have a sufficient number of knowledgeable staff to:

- Develop, conduct and evaluate the competitive procurement process;
- Negotiate with the Food Service Management Company 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 both fixed-price and cost-reimbursable contracts);
- Ensure the appropriate return of discounts, rebates, and credits (in cost-reimbursable contracts) when the solicitation and contract includes purchasing services;

- Coordinate with the company on behalf of the district in all aspects of the Program and district operations,
- Review Claims for Reimbursement;
- Control the food service operations; and
- Perform the responsibilities that must be retained by the district. Again, the district cannot relinquish the Program to it's contracted management company.

District Considerations

- Analyze the Food Service Operation
- Identify the current cost
- Determine the type of operation desired
- Analyze all non-fiscal aspects of the current food service operation.
- What parts of operation should be contracted?

So what should a district consider when deciding whether or not to contract with a food service management company? Taking the following steps will aid tremendously in the decision making and in determining how to best meet the food service goals and objectives of the district.

First, identify the annual costs associated with operating the food service. Determine the cost of food, labor, supplies, equipment, indirect costs, employee benefits, the use of USDA Foods, and other costs related to the food service by school and the overall district. This will include the cost of all non-program foods and meals served.

Knowing these operational costs by account enables the district to make informed decisions on how they may lower these costs. We have provided sample worksheets in the June 2016 Guidance in Appendix C-E that can be used to conduct this type of analysis. Knowing this information may enable the district to make informed decisions on how to improve the food service operation without contracting with a food service management company. However, some of these decisions may be challenging to carry out. The services of a food service management company may be beneficial and the information developed during the analysis will be extremely useful to all food service management companies choosing to offer a bid or response to a solicitation.

You will also need to analyze all non-fiscal aspects of the current food service operation such as conducting local wellness policy activities, meeting nutrition goals, and educational activities such as developing and/or providing nutrition lessons, support for school gardens, and managing or implementing farm to school activities. All of this information will be

necessary for a food service management company to fairly determine how to offer a bid or response to a solicitation.

Consider the benefits and consequences of contracting any or all of the program management/administration, procurement services for food, supplies, and/or equipment, and the management of personnel services. Including all non-fiscal and service requirements is essential to ensuring the district obtains the services it is seeking. Districts may want to consider contacting the State agency for technical assistance in conducting this type of analysis prior to issuing a solicitation.

District Considerations

- ❑ Contact the State Agency/State Distributing Agency.
Technical Assistance & Training/Prototype contract.
- ❑ Contact other districts.
Advice.

You will also need to contact the State Agency and/or State Distributing Agency. The State Agency is responsible for oversight of the Child Nutrition programs within their respective States and are required to provide Technical Assistance and Training for districts. The State Agency may also require that a Food Service Management Company prototype contract is used.

Contacting the State Distributing agency will assist in determining how the district must comply with requirements in Subpart D of 7 CFR 250 and what provisions the company must follow with respect to use of USDA Foods.

Finally, districts should contact other districts that contract the food service program to a food service management company to obtain any advice they can provide. While districts should not use another districts contract or perhaps use the same food service management company, you can gain insight from their experiences on working with these companies, especially if this is unfamiliar to the district.



State agency FSMC Requirements

- ▶ Annual contract review of each district-FSMC contract prior to execution
- ▶ Review each contract amendment between districts and FSMCs prior to execution

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Before we move to the details of the solicitation process, let's cover the requirements of the State agency in relation to Food Service Management Company contracts. The State must annually review each contract (including all documentation supporting the original solicitation) between any district and Food Service Management Company to ensure compliance with all Federal or State regulations, and policy guidance prior to execution of the contract by either party.

As part of this review, State agencies must ensure that districts, when using a request for proposal and awarding a cost-reimbursable type contract, include the provision found in 7 CFR 210.21(f), which states:

“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”.



State agency Requirements

- ▶ Conduct an on-site review at districtst once during each 5-year period
- ▶ Provide assistance to districts to ensure Program compliance.

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The State is also required to conduct an on-site review of each contracting district at least once during each 5-year period. These are often completed during the Administrative Review; however, it is not required to be done at this time. The on-site review must include an assessment of the district's compliance with Program regulations and contract monitoring. When purchasing services are included in the district's solicitation and contract and when a cost-reimbursable contract is awarded, the State agency must monitor how the district is tracking discounts, rebates, and credits for commercial food and supplies and ensuring the value of USDA Foods is returned to the nonprofit food service account. The return of the value of USDA foods is a requirement for both cost-reimbursable and fixed-price contracts. Likewise, compliance with Buy American is also applicable.

Additionally, because State agencies provide assistance to districts to ensure compliance, they often establish submission dates for contracts and contract amendments to ensure their review is completed in a timely manner for contract oversight. Also, many States choose a formal registration for food service management companies which provides an opportunity for States to identify all food service management companies operating in their State. This information is useful for State agency oversight activities, and registration also enables the State agency to provide interested districts with information on specific companies as well as the names of districts that contract with a food service management company.

District Procurement of FSMCs

☐ Full and open competition

☐ Procurement methods

2 CFR 200.320

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Let's look at the necessary procurement processes for contracting with a food service management company.

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

- Unreasonable requirements such as unnecessary experience and bonding requirements
- Noncompetitive pricing practices such as collusions between firms
- Organizational conflicts of interest
- Inappropriate practices such as entering into negotiations with a firm prior to evaluating proposals
- Insufficient time allowed for submissions of proposals,
- Giving considerations to overly responsive responders, AND
- Any arbitrary decision or action related to the procurement.

The available procurement methods are outlined in 2 CFR 200.320. These include the informal methods of micro-purchase and small purchase method; and the formal methods: Sealed Bids or Invitation for Bids (IFB) and competitive proposals or Request for Proposals (RFP). Most solicitations will be made using sealed bids or competitive proposals, so let's look at these solicitation methods.

District Solicitations

Sealed bids/IFB

Contract type: Fixed price with or without price adjustments

Advantages/Disadvantages

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Sealed bids or Invitation for bids are most often used for tangible items such as products and services because this allows for contracts awarded solely on the basis of cost. This solicitation method can be more simple when the document is drafted well. Also, there is no need to negotiate with the bidders. The key to using this solicitation type is in the development of the solicitation to ensure all terms, conditions, and provisions cover the needs of the Program as the bids must be evaluated solely on the basis of cost for awarding a fixed price contract. Remember, fixed price contracts can have a cost adjustment tied to a standard index as long as this provision is identified in the solicitation.

Also when using an Invitation for Bid, it is imperative that the specifications for goods and services are clear. This will include a clear and accurate description of the food service operation to be delivered by the awarded company.

For example: Will the company provide management services only? Then the fee may be a per meal fixed fee for management or a fixed management fee based on specific services to be provided. OR, if the company will provide a fixed price for a complete meal which includes the cost of food, supplies, and/or labor and management services, the specifications for the food and supplies to be provided must be made clear including ensuring the district complies with the Buy American provision for all foods purchased for meal services.

Consider these factors when using sealed bids:

The district must identify the fixed scope of services; which programs will be operated, the products and services to be provided, the quality and nature of the food service to be

provided and which costs are contracted to the company.

Districts often use an invitation for bid as no negotiation is needed, when more than one company is willing and able to compete for the contract, when the State agency has mandated that only an Invitation for Bid can be used within the state, and when a fixed price contract is to be awarded to the lowest responsive and responsible bidder.

An Invitation for Bid must include the time and place for opening bids, as well as any information concerning pre-bid meetings and level of authority and process required to officially award a contract, such as the need for board approval. For districts operating a Summer Food Service Program, a bid bond and performance bond are required as outlined in 7 CFR 225.15(m)(5-7) and not subcontracting any portion of the meal as required in both the Summer and Child and Adult Care Programs.

The advantages in using sealed bids are many:

- The district is able to more accurately estimate costs and staff resources needed
- The Identification of Revenues and Expenses is easier to track
- There are no Negotiation Responsibilities
- Use of economic cost adjustment provisions tied to a standard index allows the fixed-price to be periodically adjusted, a huge reason to use this contract type
- Food quality and desired program services, when clearly described, are much easier to evaluate for contract award to the lowest responsive and responsible bidder
- And last, but not least, monitoring of a fixed price contract is simple for the service described as invoices are paid based on the number of meals served x the company per meal rate that was bid.

The primary shortcoming of using sealed bids is that districts frequently fail to properly assess their needs or describe the services they desire including the food quality and meal service they are seeking. If the bid document does not clearly describe this service, project the scope, or identify the quality of food and supplies requested, the district may not receive the food quality or desired service they are seeking.

District Solicitations

Request for Proposals (RFP)

Contract type: either
fixed price or cost-reimbursable

Advantages/Disadvantages

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Districts may use the competitive proposals method which employs the use of a Request for Proposal or RFP. Districts often choose the competitive proposal method when the purchase of products and services cannot be clearly defined and differ along dimensions other than price alone. The basis for awarding a contract not solely dependent on full compliance with the terms and conditions dictated in the solicitation and cost, but based on other factors offerors are proposing. However, FNS does require the price to be the **primary** factor when evaluating and awarding contracts when using an Request for proposal.

Like the sealed bidding method, the competitive proposal method requires a clear description of the technical requirements to be attained. The competitive proposal method also requires the development of evaluation and scoring criteria of the factors to be considered. Once proposals are evaluated, districts may engage in negotiations/discussions with responsive and responsible respondents who are offering proposals that appear to be most advantageous to the district before awarding a contract.

The resulting contract from a competitive proposal may be **either** a fixed-price (with or without cost adjustment provisions) or a cost-reimbursable contract. No other contract type is allowed. "Cost-plus-a-percentage-of-cost" or "cost-plus-a-percentage-of-income" contracts are prohibited. Refer to 7 CFR 210.16(c) and 2 CFR 200.323(d).

However before using a competitive proposal, districts need to determine if they possess the technical skills necessary to develop a solicitation that reflects the type of food service operation the district wants and the skills to negotiate with proposers, ensuring the district's

expectations are met as outlined in the solicitation. Additionally, the district must develop the evaluation and scoring criteria, **of which price must be primary**, and must possess the knowledge of the Program and ability to score proposals based on the evaluation criteria and the requirements in the solicitation.

Consideration must also be given to ensure the district's legal counsel reviews the proposed contract language to ensure it reflects the original solicitation and details negotiated. This means the proposer cannot provide the district with a [quote] "standard" [unquote] contract the food service management company always uses with schools; districts must write the contract without additional input from any proposer beyond the agreed upon terms and conditions identified in the proposal and during the negotiation. Once the contract is signed, the district work is not over. Now comes the task of contract monitoring.

Contract monitoring is the on-going process that involves periodic on-site visits to ensure the food service management company is performing the services required in the contract, as well as, reviewing the costs submitted on invoices to ensure those cost also meet agreed upon terms outlined in the solicitation and contract, if a cost reimbursable contract is used, in accordance with 7 CFR 210.21(f), the agreement with the State agency, and with the cost principles in the 2 CFR 200.400.

Advantage of using a competitive proposal are:

- There may be greater flexibility in evaluating responses using the published evaluation and scoring criteria, which reduces the limit to selecting the proposal based on price alone. However, **Price** must be the **primary factor**.

The disadvantages of using a competitive proposal may include:

- Complex and extensive monitoring of revenues and expenses
- Challenges with cost escalation during Periods of Rising Prices as the district assumes **all of the risk** when awarding a cost-reimbursable contract, but the district may benefit if the prices drop as the saving from the reduction of costs must be passed along to the district
- If the district lacks the Essential Skill and Experience to negotiate the contract, the district may not obtain the program operations the district was seeking in the solicitation. This process requires knowledge, skill, and experience in procurement regulations, child nutrition program regulations, allowable cost provisions, the skill of negotiation, contracting, legal expertise, and an understanding of the overall district's operations and financial management needs.

Characteristics of a Comprehensive Contract

- Authority - 7 CFR 210.16(c)
- General Provisions
- Meal Service Provisions
- Financial Provisions
- Other Provisions



7 CFR 210.16(c)

Now, let's discuss food service management company contracts. First the authority that defines these contracts is found in program regulations 7 CFR 210.16(c).

There are specific provisions districts must include in food service management company contracts. These include General provisions, Meal Service provisions, Financial provisions and other pertinent information.

Federal requirements must appear in the solicitation and contract documents. For the district's convenience when the Guidance on contracting with a Food Service Management Company was published, FNS included both Program and Government-wide regulations in Appendix A. The actual provisions are recommended rather than referencing citations to ensure clarity of expectations by both parties of the contract. Remember, **“regardless of whether a provision actually appears in the contract documents”, it is the district's responsibility to ensure their food service program is operated in accordance with Program regulations.**

General Provisions

- Compliance w/Federal and State Regulations
- Professional Standards
- USDA Foods



Districts need a comprehensive contract that covers a wide range of areas that delineate both the district's responsibilities and the food service management company's responsibilities. Some of the areas include compliance with Buy American, the district defined geographic preference for the purchase of local foods, if optioned, requirements that the food service management company obtain the best price and provide the quality of food and supplies specified by the district, and the required use and control of USDA Foods, just to name a few.

Compliance with Federal and State regulations is essential for districts when they participate in the Child Nutrition Programs. All contracts should require that the food service management company to conduct Program operations in accordance with all applicable Program regulations, FNS instructions, and policies. Incorporating Program regulations into the contract provides a common basis for evaluating contractor performance.

Contracts should also contain references to applicable State regulations. State procurement standards may be more restrictive than Federal requirement and the contract must reflect those requirements. Additionally, districts must ensure provisions are included to maintain compliance with State and local health and sanitation requirements. Districts may consider including an attachment to the contract which summarizes all of the Federal and State requirements instead of incorporating them throughout the contract. FNS included the Federal requirements as an attachment in the June 2016 Guidance that can be found in Appendix G.

Food service staff professional standards is another concern that will need to be

addressed. Both employees of the district and of the food service management company must comply with the Professional Standards requirements published in the Federal Register in March 2015. Consideration of these requirements should be included in the solicitation and the evaluation and scoring criteria for the proposals. This should include a plan for meeting and maintaining the certification and training requirements.

Additionally, provisions must be included for the use, storage and inventory management of USDA Foods and the crediting for the value of USDA Foods. In accordance with 7 CFR 250.51(a) and (b), contracts must ensure that the food service management company credits the district for the full value of all USDA Foods received for use in the district's meal service in the school year, on at least on an annual basis. It is the district's responsibility to monitor the USDA Foods allocated and received to ensure that the value of USDA Foods is credited to the nonprofit food service account, which is why contract monitoring is so important. This crediting must be done through invoice reductions identified on the invoice, or through refunds, discounts, or other means as outlined in the solicitation and contract. The crediting also includes crediting for the value of USDA Foods contained in processed end products when the food service management company is authorized to procure processed end products on behalf of the district.

General Provisions

- Monitoring
- Use of an Advisory Board



Another General provision is for the district to monitor the food service management company to determine whether the food service operation is in conformance with their solicitation and contract and Program regulations. Contract language should also confirm the district's responsibility to implement internal controls required in 7 CFR 210.8(a) and to ensure resolution of Program reviews and audit findings.

Contract Monitoring includes, but is not limited to:

- Ensuring all contract provisions are being fulfilled, such as local health and sanitation requirements;
- Keeping records for menus, standardized recipes, production records, reimbursable meals served for all Programs operated, non-program revenues and expenses, and paid lunch equity calculations, if included;
- Invoicing expenses submitted to the district as contracted depending on the contract type; and
- Determining the value of credits of USDA Foods and for commercial foods and supplies; when a cost-reimbursable contract is awarded; ensuring that discounts, rebates, and credits are reported on the invoice and **not** subtracted and reported as a "net" cost.

Finally, if the district wishes to have the food service management company work with the district's advisory board, also a requirement when the district contracts with a management company, the contract language must identify this as a specific responsibility. Notes of board meetings must be maintained to show compliance with this requirement of the district.

Meal Service Provisions

- Descriptive Information Regarding Food Service
- Types of Meals



Contracts must cover the range of services expected from the food service management company. These services include providing meals that comply with the meal pattern requirements for the Programs operated, the National School Lunch Program, School Breakfast Program, the Summer Food Service Program, and Child and Adult Care Feeding Programs, as applicable. The details for how the meal service is provided must be clearly described to ensure Program operations are as the district solicited. For example, did the district request in its solicitation that a single component menu be served in its operations or did the district solicit for a complex multi-station meal service that includes salad bars, pizza bars, deli-sandwich stations, hot food stations, and other scatter systems that offer multiple entrees, a variety of fruits, vegetables and grains choices and include all food specifications, grade, and quality standards? This description in the solicitation document must be clear and not left for the company to try to determine what the district is desiring for a food service operation. It's also necessary to ensure the district receives the appropriate information to evaluate the responses and award the contract to the most responsive and responsible contractors meeting the requirements.

The division of responsibility for other activities that make up Program operation must be covered in the contract. These include who is responsible for what including - food purchasing according to the district's food grade and specification requirements, food storage requirements, inventory, preparation, meal counting and claiming, management of the district's free and reduced price meal point of service system, and other related activities. This must be delineated in the solicitation and contract. Refer to the Food Service Management Company Handbooks for additional guidance.

Districts are encouraged to consider providing a fact sheet; this should be a simple description of the food service operation, which would be described in more detail in the solicitation.

When the district includes the menu and food specifications, all companies must respond to these food specifications to ensure evaluation of the best proposal and price is conducted appropriately for contract award. In those cases where the district does not supply menu or food specifications, the company identifies the food products and quality they will offer, and they **must** include specifications using standards such as grade, weight/size, item label, CN label requirements, nutritional qualities, etc., to allow the district to accurately evaluate bids/responses for contract award and monitor compliance with these specifications.

Including the Buy American provision in 7 CFR 210.21(d) in solicitation and contract helps to ensure the district is compliant with this provision. This provision is especially essential when the company is expected to conduct the procurement for food on behalf of the district. When exceptions to the Buy American provision are identified, the company must notify the district in advance of purchasing non-domestic substitutes and the reason for requesting approval of the exception. The district must decide if the company may purchase non-domestic foods in these situations. For additional information see policy guidance SP 24-2016, Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program, dated February 3, 2016)

Meal Service Provisions

□ 21-Day Cycle Menu



Let's look at descriptions for Program meals and the 21 day cycle menu the district must provide.

The solicitation and contract must include the type of program meals that will be provided. The different types of program meals refer to the National School Lunch Program and School Breakfast Program, and other Programs to be offered, as well as a la carte, vending machine sales, adult and other non-program meals such as catering services. How are these to be served and counted to ensure the service is provided as the district desires? Adding Programs such as the Summer Food Service Program or the Child and Adult Care Food Program At-risk Supper meal after a contract is awarded often represents a material change to the contract that may result in a requirement to re-solicit the services. Districts must ensure they include all Programs to be operated, or planned to added at a later date, when the solicitation is published. Likewise, if the district plans to close schools or open new schools during the potential life of the contract, this needs to be delineated in the solicitation as this information may change the scope of the contract and affect future contract value. Consider all plans that may affect the contract and include this information so all bidders/responders will be informed of the potential for the contract.

The district must provide a 21-day cycle menu for the food service management company within the solicitation for bids or proposals. Having the district provide the menu helps to explain the meal service expectations the district is seeking. For example, the district may want to offer multiple food selections to comply with the meal pattern by using multiple food stations and menu choices, the number of times items may are served, the frequency of the use of processed foods vs foods prepared from 'scratch', or using "whole" food ingredients,

or other high quality food standards. This information must be included in the solicitation. When districts include the menu they want served, they define the food quality and food selection they are seeking and can incorporate cultural foods specific to their population needs. Including the menu provides a basis for estimating the average cost per meal when evaluating bids or proposals to award a contract to the lowest responsive and responsible bidder/most advantageous to the Program with price as the primary factor. Providing the menu the district expects is one key way of building quality into the solicitation for better evaluation of contract award and contractor performance in monitoring.

However, if the State agency approves the food service management company to design the menu, in their response to the solicitation, the district must provide information for how they will evaluate the company's menu. Such criteria include affordability, nutrition and meal pattern requirements, food quality expectations such as food grades expected, domestic foods for compliance with the Buy American provision, portion size, CN labels, dietary specifications, student appeal, and if desired, the use of local and seasonal foods and recipes. This list goes on and only the district can describe the program it is seeking.

This is another reason to ensure the district has qualified personnel to assist with the development and evaluation of bids or responses to a FSMC solicitation.

Meal Service Provisions

- General
- Quality, Extent and General Nature of Food Service
- Activities Supporting Meal Services
- Financial
- Documentation and Audit Provisions



Solicitations and contracts are strengthened by designating the specific range of services the district is seeking. The absence of specific services and a clear description of these services weakens the solicitation process. You've heard the old expression, "you don't always get what you want" but you can get what you clearly describe in your solicitation and contract.

Solicitations and contract language must specify the quality, extent and general nature of the food service. Contract language should address standards such as applicability of USDA major ingredient specifications and the use of the Child Nutrition Labeling Program. Contract language can also be used for food testing and to include a provision that requires company to refrigerate and maintain samples of food items served for testing in the event of an outbreak of foodborne illness. Additionally, Program regulations found in 7 CFR 210.11 and 210.14, allow districts to exert control over the sale of foods sold in competition with Program meals. Included are snacks and beverages sold as part of a la carte meal offering or through vending machines, school stores, fund-raising, and other outlets for non-program foods. Districts are encouraged to address its position regarding the kinds of foods to be offered, the location of vending machines, and the hours of students' access to a la carte and/or vending machines.

Solicitations and contracts must also contain language about activities that support the food service the company will be expected to provide. Will the company provide services for purchasing using district quality standards including the requirement to purchase domestic foods. menu planning, product inventory and storage, management of district employees (including hiring, training, and supervising), school gardens and nutrition education, if

applicable. All services must be included in the solicitation and contract for the expectations to be clearly defined.

When a cost-reimbursable contract will be awarded, FNS strongly encourages the use of an audit provision to ensure the management company charges the district their vendor "cost" and credits the invoice when rebates, discounts, and credits received. Remember, discounts, rebates and credits must be reported on invoices submitted for payment NOT subtracted from the cost to be reported as a "net" cost. This is part of contract monitoring requirements and it is the district's responsibility to ensure invoices report this information in the frequency outlined in the solicitation and contract. FNS encourages the crediting to be reported monthly, but at a minimum, this must be reported annually.

Meal Service Provisions

- Inventory and Storage
- Nutrition Education
- Farm to School
- Non-Discrimination



As mentioned earlier, when the food service management company will be asked to manage other aspects of the food service operation such as the inventory and storage of all foods, including USDA foods, provide nutrition education classes to students or staff, these other tasks must be included in the solicitation and contract. Other items food service management companies may be expected to assist in or take a lead in is oversight of the development or maintenance of a school garden which must also be included. And most certainly, the company must always ensure that no child is subject to overt identification of eligibility as described in 7 CFR 245.8 or is discriminated against; therefore, the solicitation and contract must include requirements addressing these concern to include requirements found in the FNS Instruction 113 Civil Rights Compliance and Enforcement – Nutrition Programs and Activities, Appendix B. The State agency can provide the most current version of this instruction. The number of provisions are not limited to these discussed, rather, the district must consider all aspects of their food service operation and be sure these are included in the solicitation and contract to clearly define their expectations, conditions and assumptions.

Financial Provisions

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- ▶ Fee structures
- ▶ Cost controls
- ▶ Financial management



Now let's look at the financial provisions to include in the solicitation and contract. The key financial provision that must be controlled is that all revenues and expenditures flow through the nonprofit school food service account. Let's take a look at the fee structures, cost controls and financial management.

Federal Program regulations permit two types of payment for fee structures in district contracts with a food service management company: a fixed-price or fee, with or without an economic cost adjustment clause, and cost-plus-a-fixed-fee. Districts must ensure that contract provisions are limited to these permissible fee structures only. A Fixed-price/fee, is permissible either under an Invitation for Bid or Request for Proposal, takes the form of a unit charge where the unit may be per meal or per a time period. For example: the fixed price per meal may be based on management services only where the district supplies the labor and food, or the fee may be based on management services and food where the district supplies the labor. Or the fixed price may be based on all products and services with a management fee included, or quoted separately. This is why the solicitation and contract must be clear for what products and services the company is to provide.

The same may be true under a cost-reimbursable contract. Districts must be clear as to what the pass-through costs will include. The flat-fee must be specified as a cost per-meal, or on an annual basis and specify the frequency for payment such as monthly, quarterly, or annually. Such fees are to be fixed for the entire contract duration and renewals unless a provision allowing for periodic cost adjustment is otherwise stated in the original solicitation. The contract must have enough detail regarding what is included in the fee structure to ensure that there is no double billing, i.e., same item(s) included in the management fee

and administrative fee. Additionally, the contract needs to specify the cost documentation requirements.

Cost controls often need to be established to ensure the program cost does not exceed the estimated revenues. Likewise, if Program equipment breaks down, a provision needs to establish the dollar value of equipment that the district will cover either per year and over the life of the contract. The district needs to include a provision for the repair and replacement of food preparation and serving equipment as equipment repair and replacement can occur at any time. It is imperative that the district understand its operational needs which includes the age and condition of the kitchen equipment and establish a dollar value for replacement that is communicated in the solicitation and contract. Districts are reminded that equipment, defined at 2 CFR Part 200.33, means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds \$5,000.

The list of financial management considerations can be daunting. How will the reimbursable meals be accounted for and credited to the nonprofit food service account. The same is true when nonprogram foods are purchased and sold. These expenditures and revenues must be accounted for as well as when adult meals and other nonprogram catering meal services are to be provided. If special functions are to be provided by the company, the expenditures for products and services as well as the revenues from these functions must be accounted for. Vending machines are increasingly becoming a popular way to increase revenues through the sale of nonprogram and program meals. All services to be provided must be clearly delineated as well as how the revenues will be accounted for must be controlled.

Operating Cost Guarantees and Recovery

- Guarantees
- Loss Recovery
- Recovery of Overclaims
- Negligence



Solicitations and contracts for food services may contain language by which the management company guarantees to meet financial goals specified by the district. First, the LEA must remember any guaranteed return promised by the company must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that ensures that the management company bears responsibility for failure to meet those goals. Returns cannot be contingent upon multi-year contracts as food service management company contracts can only have a duration of one year with an option with no more than four one-year renewals as cited in 7 CFR 210.16(d). **If the solicitation and contract do not clearly describe the conditions of the guarantees, the guarantees are subject assumptions** and conditions established by the company which may not be to the benefit of the LEA. These conditions should be based on and minimized if the district is clear about the scope of work and information about the meal programs. Conditions may include but are not restricted to the increase in average number of meals served in an established period of time, % eligibility for free and reduced meals, number and length of meal service periods; expectations for the number and types of program meals and non-program foods and meals to be served, handling of unpaid meal charges, which all could be subject no changes in the number of schools to be operated, number of serving periods and length of meal service time, etc. A response by a company that includes an exhaustive list of company developed assumptions and conditions is usually an indication that the solicitation failed to clearly define the scope of work and the expectations for the meal service program the district is seeking.

Having provisions to address the liability for losses of food, participation or other conditions are often identified in one of two ways: the company may either be required to reimburse

the district for the loss without limit or it may reimburse the district with limits equal to the management fee or a specified ceiling for the dollar value of a loss. Contracts should also address the length of time the district can seek recovery of losses.

Districts are encouraged to include a provision that requires the company to pay for any overclaims assessed by the State Agency due to negligence or noncompliance with regulations. This liability should correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the State Agency-established record retention timeframe, whichever is greater.

Negligence and conflict of interests are another area that needs to be addressed in the solicitation and contracts. It is strongly suggested that if there is a waiver of liability by the district for damages by the company to equipment or facilities, that the waiver contain an exclusion for any damages caused by negligence of the company or its employees. Additionally, Food Service Management Companies are held to the same conflict of interest requirements as a district employee.

Certifications:

- Suspension/Debarment
<http://epls.arnet.gov> or sams.gov
- Lobbying
- Independent Price Determination
- Specifications
- Conflicts



We are nearing the end of our presentation so let's look now at a number of certifications that are required for all contracts valued over the Simplified Acquisition Threshold. The Federal value is \$150,000 but State or local thresholds are often more restrictive. These include: suspension/debarment, lobbying, and independent price determination. Many State agencies may have additional certifications required by the States procurement procedures so districts need to obtain this information from the State agency before publishing a solicitation and awarding a contract. Let's look at the Federal certifications now.

Districts must obtain certification that a company is neither excluded nor disqualified before doing business when Federal funds are used. The uniform Federal suspension/debarment certification has been abolished and the collection of paper certifications is no longer mandatory. Current rules provide greater flexibility in meeting requirements. A district may meet the requirements by simply including the provision from Appendix II to 2 CFR 200 in its solicitation and contract or may continue to use prior methods approved which include:

- 1) Checking the Excluded Parties List System available on the internet at the above listed websites.
- 2) Collecting a certification that the company is neither excluded nor disqualified. Since a Federal certification form is no longer available, a State agency or district electing this method must devise its own certification form.
- 3) Including a clause to this effect in the solicitation/contract.

In accordance with the provisions of 2 CFR Part 200.450 and Appendix II to 2 Part 200,

companies that bid for an award exceeding \$150,000 must file the required certification. Such bidders must disclose lobbying activities. Districts need to contact their State agency for further information regarding disclosure of lobbying activities.

Certification of Independent Price Determination (also known as "non-collusion statement")— is strongly suggested, though not required by Federal regulations. This is a statement that the company certifies that the price (s) in the offer has been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition.

A provision stating that any silence, absence or omission from the contract specifications concerning any point must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship are of a quality that would normally be specified by the district must be used.

The solicitation and contract should also include a provision containing language regarding how conflicts will be resolved should these arise. Priority must be given that the language in the original solicitation document will prevail over responses and contracts.

Sealed bids/IFB

- Lowest responsive and responsible bidder

Request for Proposal

- Most advantageous to the Program with price as the primary factor among all factors considered



We have covered an extensive amount of information that needs to be included in a solicitation and contract to ensure Program operations are clearly defined and in compliance with the State agency agreement and Program regulations. Before we close, we want to once again make it clear that the solicitation must be very clear, the evaluation for contract award must be to the lowest responsive and responsible bidder or respondent regardless of the method of procurement used; a sealed bid or a Request for Proposal. The evaluation and scoring criteria for an RFP must clearly identify price as the primary factor. Failure to evaluate and award contracts using this cost evaluation will result in the requirement for a re-bid in time for the next school year if found by the State agency during a procurement review, or if found by FNS during a Management Evaluation of State agency oversight. We cannot emphasize enough this evaluation provision as districts and management companies alike report the process of drafting and publishing a solicitation, as well as, developing a response to such solicitations is a very expensive and time-consuming process. Therefore, make sure the evaluation provision is clear. Price does not have to equal to or exceed 51%, but among all criteria identified, cost or price must be weighted the highest. It is not sufficient for price to be equal to other criteria, price must be primary.

Questions?

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USDA

There are many other provisions and requirements districts may need to consider. However, if districts need additional assistance please contact your State agency and/or Regional Office. The majority of the contents of this webinar was taken from the Guidance Handbooks for Contracting with a Food Service Management Company published earlier this year. You will find these documents on the USDA website or you may download these from Partnerweb.

We will now move to the Question and Answer portion of this webinar. If you will give us a few moments to review the questions that have come in on-line, we will seek to answer as many of these as possible. We will also share many of the questions we have already answered as others may have this same question.

Q & A

This concludes the webinar on Developing Solicitations and Contracts for a Food Service Management Company. Thank you for spending this time with us this afternoon. The slides will be available on Partnerweb in the very near future and a recording will be available in the next few weeks. A Partnerweb announcement will be published when each of these are available. Also, remember that the vast majority of this webinar was taken from the handbooks published in June 2016 for districts and States on Contracting with a Food Service management Company. We hope you will refer to these handbooks when developing all solicitations and contracts for this service.

Thank you again for joining us.