USDA
United States Department of Agriculture

Food and Nutrition Service

Braddock Metro Center

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DATE: April 21, 2023

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SUBJECT: Best Practices for Contracting with Food Service Management Companies

TO: Regional Directors
Special Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

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| **Issuing Agency/Office:** | FNS/Child Nutrition Programs |
| **Title of Document:** | Best Practices for Contracting with Food Service Management Companies |
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| **Summary:** | This memorandum provides information regarding procurement practices for the School Breakfast Program and the National School Lunch Program. 2) This memorandum relates to Program-specific procurement regulations at 7 CFR 210.16, 210.19(a)(5), 210.21, and 220.7, 220.16 and Federal procurement standards at 2 CFR 200.318-327 This memorandum applies to State agencies administering and school food authorities implementing the School Breakfast Program and the National School Lunch Program. |

The Food and Nutrition Service (FNS) recognizes that as a result of the COVID- 19 pandemic, State agencies (SAs) and school food authorities (SFAs) have encountered various challenges related to procurement when administering and operating the school meal programs. Some of these challenges include supply chain disruptions, unanticipated cancellations of FSMC contracts, and increased food and supply prices. SAs and SFAs have worked tirelessly to overcome these challenges and have demonstrated an abundance of flexibility in identifying solutions in order to continue providing healthy and nutritious meals and snacks to students nationwide.

As part of the pandemic response, FNS provided additional financial and technical assistance to help states and operators meet these challenges. FNS continues to evaluate SAs' and schools' needs in order to provide information and tools to help navigate the many challenges of procuring food and supplies supporting the school meal programs. This memorandum provides additional procurement-related technical assistance and information for SAs and SFAs to consider when entering into and executing contracts with Food Service Management Companies

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(FSMCs). FNS plans to provide additional procurement and contracting guidance in the future. Finally, FNS is assessing future rulemaking regarding procurement and contracting in the school meal programs.

**Background**

States and SFAs are subject to the Program-specific procurement regulations, such as 7 CFR 210.16 , 7 CFR 210.19(a)(5), 7 CFR 210.21, 7 CFR 220.7, 7 CFR 220.16 and Federal procurement standards, at 2 CFR 200.318-327, as applicable. States are responsible for the oversight of SFAs' operations of programs, including procurement practices, and provide significant technical assistance to SFAs. While many SFAs independently operate their school meal programs by entering into contracts for food and supplies, some SFAs contract with FSMCs to execute parts of the SFA's food service operations. In addition to Federal regulatory requirements, SFAs are subject to applicable state and local laws.

**FSMC Contract Considerations**

***Before Going Out to Bid***

- Assess needs:
  - When considering pursuing a FSMC contract, SFAs first need to determine what aspects of the school meal program need to be managed. SFAs should also ensure they maintain any required Program requirements outlined in 7 CFR 210.16(a) and 220.7(d)(1).
  - SFAs can contract for some services using informal procurement methods (2 CFR 200.320(a)).
  - The value of FSMC contracts generally exceeds the simplified acquisition threshold used for informal procurements; therefore, SFAs must use formal procurement methods (sealed bid or proposal). (2 CFR 200.320(b)). A Cost Reimbursable[1] or Fixed Price[2] contract would be used when choosing a proposal (2 CFR 200.320(b)(2)).
- Use required forms:
  - Many SAs require use of a template for contracts between SFAs and FSMCs.
  - SFAs should add to contracts all specific requirements and modifications and request SAs approval prior to execution. (7 CFR 210.16(a)(10) and 7 CFR 220.16(c)(2)).
- Utilize a State approved vendor list when choosing to send a solicitation to specific FSMCs.
- Ensure a potential FSMC is registered with the SA, if required 7 CFR 210.19(a)(5).
- Consider including a cost escalation clause in each contract, describing the frequency and amount of change in cost during the contract period. SFAs should:
  - include any basis for adjustments;
  - include the basis for the amount of change (e.g., an economic price adjustment tied to a standard index); and,

[1] Cost Reimbursable contract is defined as a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee. (7 CFR 210.2)

[2] Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period.

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  - ensure that built in cost adjustments are reasonable and realistic to prevent contract modifications that may result in a material change.
- Consider defining material change in the contract.
  - If material change is not defined in the contract, then SAs and SFAs will need to work with their legal counsel to assess whether a material change is occurring after the contract is awarded and executed.
  - Including information in the contract on material change/ defining it will provide clarity for all parties.
- Conduct market research on the FSMCs that work within the surrounding region. There may be an opportunity to visit other SFAs that employ an FSMC and allow for tours/visits. Complete due diligence and review companies and their capabilities before a solicitation is made public.

***Labor Contract Provisions to Consider:***

- To ensure effective and efficient continuity of service, SFAs can incorporate a first right of refusal clause for individuals employed under the SFA's current food service model. This can benefit the Program by ensuring the nutritional needs of children are not disrupted during a time of transition.
- Consider a provision requiring the contractor to provide staffing minimums based on the number of programs and level of participation at schools. Include language requiring SFA approval prior to decreasing staff at any school site.
- To ensure an appropriate staffing level at each school and to avoid delays in service, consider developing language around minimum wait times for students.
- Consider a provision requiring the contractor to demonstrate a plan to attract, train, and retain a skilled and well-qualified workforce; and which at a minimum provide benefits consistent with other district employees. Provisions of such a plan could include offering family-sustaining wages with clear opportunities for wage progression alongside skill progression; employer-sponsored health insurance and pension/retirement coverage options; personal and family benefits, such as paid family and medical leave, parental leave, paid sick leave, other paid time off, and mental health support, etc.; as appropriate, caregiving supports like flexible schedules, telework, childcare facilitation, and back-up childcare; predictable scheduling; and correct classification of workers as permanent employees and notification of rights of employees to all workers (including those classified as independent contractors.
- Consider a provision requiring the contractor to support and communicate to workers regarding the free and fair choice to form a union.
- Include language to ensure labor and administrative costs are broken out to confirm services are not double billed. Sample language below may be used.
  - *Invoices should show the number of meals/meal equivalents accounted for at the point of sale system for each type of meal service, charges for other food or service, credit for USDA foods used, discounts or rebates and credits due to the SFA, any other adjustments required such as non-compliance or fiscal action.*

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***Additional Contract Provisions to Consider:***

- Include language that FSMCs are required to conduct program operations in accordance with program requirements and include any applicable FNS instructions, policy, and regulatory citations (depending on what programs will be operated).
- If the solicitation includes a provision for the FSMC to procure food, supplies, equipment, or other services, include in the contract that these items must be purchased in compliance with Federal and Program procurement regulations. This includes meeting Buy American requirements.7 CFR 210.21(d) and 220.16(d). SFAs should work with their SA and ensure that their contract includes requirements around documenting domestic food purchases, including the ability to separately identify these costs.
- Include language that the FSMC accepts liability caused by FSMC negligence for claims assessed as a result of Federal/State reviews/audits, corresponding with the SFA's period of liability.
- Include language detailing FSMC responsibilities, as applicable:
    - Maintaining pertinent records at the SFA for required retention period;
    - Conducting nutrition education;
    - Calculating program and non-program food revenue and expenditures; and/or
    - Meeting professional standards training requirements.
- Include language that helps support the SFA's contracting monitoring (e.g. periodic requests for meal pattern compliance documentation, requiring the FSMC to participate in regularly scheduled check-ins, etc.)
- Consider applying a geographic preference when procuring unprocessed locally grown or locally raised agricultural products and may determine what areas are considered local.
- Consider adding a provision to allow for changes in meal delivery and packaging in case of an emergency.

***Awarding the Contract***

- When the SFA solicits a proposal, the SFA must have a written method for conducting technical evaluations and making selections of the proposals received.2 CFR 200.320(b)(2)(ii) and (iii). The SFA should:
    - use evaluation criteria with a point system to rate each category;
    - ensure that the weight given to the cost of deliverables is adequate to evaluate the proposal. While cost is important, other factors can be considered as well, when conducting the proposal method: and,
    - award the contract to the bidder with the highest score.
- When the SFA solicits a sealed bid method, the SFA must award the contract to the most responsible and responsive bidder with the lowest price.2 CFR 200.320(b)(1).
- SFAs must take affirmative actions necessary to ensure that minority businesses, women/s business enterprises and labor area surplus firms are used, such as ensuring such businesses are on the solicitation list.(2 CFR 200.321(a) and (b).

***Monitoring the Contract***

- The SFA should regularly communicate with the FSMC to ensure that the menus meet meal pattern requirements. This could include requesting completed meal pattern compliance worksheets, production records, and nutrient analyses. The SFA should also set up process for receiving, reviewing, and monitoring these documents.

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- The SFA should request interim costs statements for cost reimbursable contracts in order to track spending, if helpful or needed. A request for a monthly breakdown of all food and disposable expenditures along with supporting invoices, bills, receipts, rebates, or refunds could be included in the contract.
- The SFA and FSMC should have regularly scheduled check-in meetings to discuss any needs, requirements, areas for improvement, etc.
    - Meetings may be scheduled throughout the duration of the contract to ensure all contractual obligations and expectations are being met for both parties involved, as well as to troubleshoot and provide any technical assistance, as needed.
    - The SFA is ultimately responsible for program compliance. Regular visits can help ensure FSMC compliance and keep lines of communication open.

***Changes to the Contract***

If a change to the contract is needed, a cost or price analysis must be completed if the contract's value is above the simplified acquisition threshold, including contract modifications (2 CFR 200.324(a)). Once the cost or price analysis is obtained, the SFA's or SA's legal counsel will determine if it is a material change after reviewing the contract and the contract amendments. FNS does not define material change and discretion lies with SFA's or SA's legal counsel unless the contract stipulates any information. SA review and approval of such amendments are required prior to execution (7 CFR 210.16(a)(10) and 220.7(d)(1)(ix). While contract modifications may not be required or needed, if there are instances where costs increase, and the SFA is able to absorb these costs given new or unforeseen circumstances, a contract modification may be the correct course of action, depending on the terms of the contract.

***Contract Cancellation***

If a contract is terminated and the situation warrants it, SFAs can consider using informal procurement methods (2 CFR 200.320(a)) or noncompetitive procurement (2 CFR 200.320(c), commonly referred to as an emergency procurement, as applicable, to help ensure continuity of Program operations.

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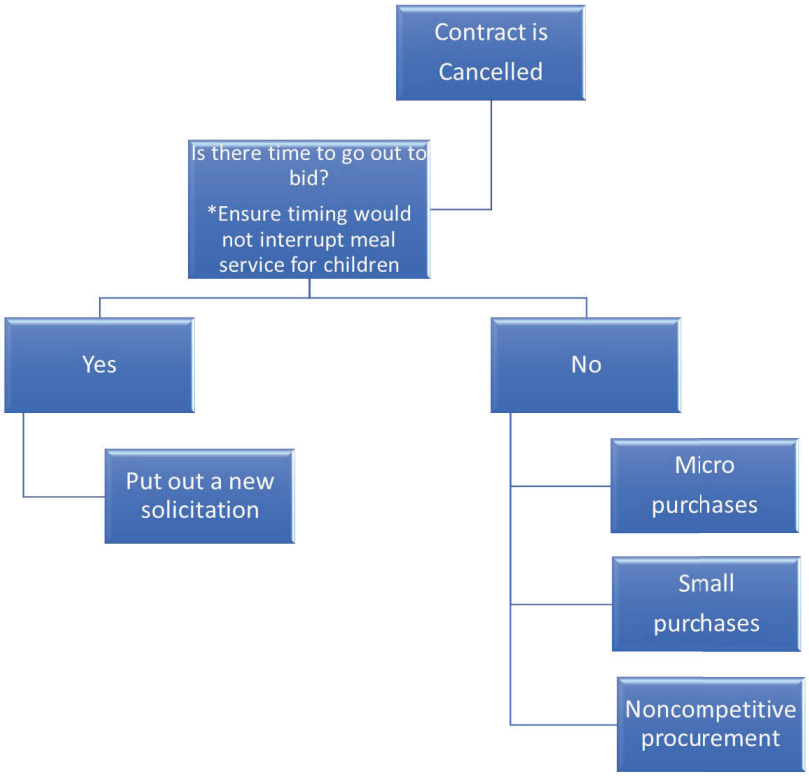


FNS is committed to ensuring that SAs and SFAs have the information and tools needed to navigate challenges procuring food and supplies that support the school meal programs. FNS will continue to identify additional information and resources that are needed for operators to successfully implement the Programs.

SAs are reminded to distribute this memorandum to Program operators immediately. Program operators should direct any questions concerning this guidance to their respective SA. SAs with questions should contact the appropriate FNS Regional Office.

Sincerely,

JESSICA SARACINO
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Date: 2023.04.21 13:23:07 -04'00'

Jessica Saracino
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