



**United States
Department of
Agriculture**

Food and
Nutrition
Service

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SUBJECT: Reminder: Procurement Requirements for the National School Lunch,
School Breakfast and Special Milk Programs

TO: Regional Directors
Child Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

Recently, we have received numerous concerns regarding the improper application of the new procurement rule, Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, which was published in the Federal Register on October 31, 2007 and became effective on November 30, 2007:

http://www.fns.usda.gov/cnd/Governance/regulations/ProcRule10_07.pdf.

Accordingly, this memorandum provides a reminder of the key provisions of the final rule and addresses the timeframe in which the provisions must be implemented. It is important that State agencies understand their responsibility in ensuring compliance with these provisions and with contract enforcement and oversight.

The procurement rule requires that school food authorities (SFAs) limit the use of nonprofit school food service account funds to costs resulting from proper procurements and contracts, and clarifies a State agency's responsibility to review and approve SFA procurement procedures and contracts. Specifically, the rule requires that SFAs include a provision(s) in all cost reimbursable contracts, including contracts with cost reimbursable provisions, requiring that costs be net of all discounts, rebates and other applicable credits.

Ensuring compliance with the rule will require that most SFAs rebid their existing contracts to include the necessary provisions discussed above. However, recognizing that a requirement to rebid all contracts immediately would pose a hardship on the SFAs, FNS included an implementation timeline to allow rebidding to occur in phases. While we hoped that the implementation timeline provided in the rule was clear, several instances have been brought to our attention in which the rule's implementation timeline seems to have been misapplied, or in some cases, ignored.

Guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract. USDA may not cite, use, or rely on any guidance that is not available through their guidance portal, except to establish historical facts.

While the final regulation applies to all new solicitations issued on or after the rule's effective date, November 30, 2007, implementation is being phased in for existing contracts. For solicitations issued prior to November 30, 2007: (1) contracts with a term of 12 months or fewer remaining are exempt; (2) contracts that have annual renewal provisions may delay implementation until expiration of the current contract plus one 12-month renewal period, with State agency approval; and (3) contracts that have a term of more than 12 months may delay implementation up to 24 months when the solicitation for the contract was issued prior to the effective date of this regulation, with State agency approval. Based on this timeline, all contracts between an SFA and a food service management company (FSMC), regardless of the date issued, must be re-bid by the 2009-2010 school year.

If a solicitation and the resulting cost-reimbursable contract require that all discounts, rebates and other applicable credits must be credited to the SFA by the FSMC, and the FSMC is in fact crediting all such discounts, rebates and other applicable credits to the SFA, then the relevant contract may be amended to incorporate the required language of the procurement final rule regarding discounts, rebates, and applicable credits without constituting a material change nor requiring a re-bid of the contract.

The SFA and State agency should make the determination as to whether the existing solicitation and contract do, in fact, require the crediting of all such discounts, rebates and other applicable credits. If so, then the SFA and the FSMC may amend their existing contract to incorporate the specific language provided in the final procurement rule, without constituting a material change.

The rule also requires contractors to provide sufficient information to permit the school food authority to identify allowable and unallowable costs and the amount of all such discounts, rebates and credits on invoices and bills presented for payment to the SFA. It is not likely that this addition to the contract would create a material change or alter the financial structure. This may be accomplished by creating an amendment to the contract which accounts for the tracking of these rebates. However, once again State approval should be sought.

Finally, we would also like to remind SFAs and State agencies that the final rule "Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions", which was published in the Federal Register on August 8, 2008, includes new requirements for the use of, and crediting for, donated foods in FSMC contracts. The rule can be accessed on the Food and Nutrition Service PartnerWeb at <https://www.partnerweb.usda.gov/ifax/index.htm>. In accordance with the implementation schedule for requirements in that rule, SFAs must re-bid contracts expiring at the end of SY 2009 (i.e., in June 2009), except in the following cases:

- 1) The contract already includes provisions relating to crediting for and use of donated foods, the method of determining the value of donated foods used in crediting, and recordkeeping requirements, that ensure compliance with the requirements of the final rule; or
- 2) The contract has an annual renewal provision that would permit it, with State administering agency approval, to extend the contract for one more 12-month period (i.e., through SY 2010).

If you have any questions please contact your Regional Office.

Original Signed

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