



State of Arizona
Department of Education

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MEMORANDUM

To: National School Lunch Program (NSLP) Sponsors

From: Mary Szafranski, Deputy Associate Superintendent
Arizona Department of Education, Health & Nutrition Services

Cara Peczkowski, Director
Arizona Department of Education, School Nutrition Programs

Date: March 17, 2012

RE: 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

Original Signed

Following the January 26, 2012, issuance of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Programs, several questions have been raised regarding its effect on current contracts between School Food Authorities (SFAs) and Food Service Management Companies (FSMCs). The following questions and answers should assist SFAs as they implement the provisions of the final rule and examine their current FSMC contracts.

Q1: Does the issuance of the final rule create a “material change” in FSMC contracts?

A1: As Arizona Department of Education (ADE) has advised previously in Policy Memorandum CN# 02-06, titled Q & A-Procurement Procedure Guidelines, the creation of a material change to a contract between a SFA and a FSMC depends on the SFA’s initial solicitation document and the resulting contract during the procurement process. United States Department of Agriculture (USDA) anticipates that some current contracts between SFAs and FSMCs will not be inconsistent with the new nutrition standards of the final rule. Those contracts would require only nonmaterial changes to ensure consistency with the final rule.



Each contract between a SFA and a FSMC will have unique initial solicitation documents and contract terms. ADE will review existing contracts to make a determination as to whether a 'material change has occurred.

ADE will apply the following questions to help determine if the change constitutes a material change to the contract:

- If there would be an increase or a decrease to the cost of the contract, would the increase or decrease in cost have caused bidders to bid differently if the prospective change had existed at the time of bidding?
- Would the prospective change materially affect the scope of services, types of food products, volume of food products, etc., in both the solicitation document and resulting contract? For example, the final rule requires schools to serve whole-grain rich products, and specific varieties of vegetables, which already may be included in current contracts.

Q2: If it appears that a SFA's implementation of the final rule will create a material change to the contract with the FSMC, must the SFA rebid?

A2: Per regulations, contracts between SFAs and FSMCs must be no longer than one year in duration with four optional annual renewals. Every SFA should be annually reviewing its FSMC contract with no expectation by either party to renew the contract. As noted above, ADE will review the current contract and determine if any prospective changes would result in a material change. If ADE determines that prospective changes would be material, the SFA must:

- Conduct a separate procurement to obtain the desired deliverable that created the material change; or
- Ensure that the new solicitation associated with the rebid contains the appropriate specifications and provision to ensure conformance to the final rule.

ADE will notify the SFA if they are required to conduct a new procurement and the SFA must conduct the procurement at the earliest feasible juncture. However, SFAs must ensure that a new procurement is completed for the 2013-14 school year.

Q3: If ADE has determined that a material change would occur as a result of implementation of the final rule but conclude that a new procurement cannot be completed prior to the 2013-2014 school year, may the SFA amend its current contract in order to ensure full implementation of the final rule?

A3: Yes. As noted above, annual renewals of a contract between a SFA and a FSMC occur at the discretion of the SFA. In this case, both the SFA and the FSMC would need to agree to the



terms of any amendment to the current contract necessary to ensure full implementation of the final rule.

Should a FSMC be unwilling or unable to agree to such an amendment to the current contract, the SFA would need to take immediate action. For example, immediate action may include:

- Termination of the current contract between the SFA and the FSMC in accordance with the termination provisions and issuance of a new solicitation;
- Issuance of a separate solicitation to procure the necessary foods in order to ensure compliance with the final rule, consistent with the current contract between the parties.

Q4: If it appears that a SFA’s implementation of the final rule will create a material change to the contract with a contractor other than a FSMC (i.e., distributor), should the same principles and time frames outlined in this policy memorandum apply?

A4: Yes, the principles and time frames outlined in this policy memorandum should apply to all contracts between a SFA and a contractor.

If you have any additional questions or concerns about this memorandum, please contact the Contracts Management Officer, Ellen Pimental at (602) 542-6208 or email her at Ellen.pimental@azed.gov.

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