State of Arizona
Department of Education

Tom Horne
Superintendent of
Public Instruction

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MEMORANDUM

To: School Health & Nutrition Program Sponsors

From: Tina Herzog, Acting Deputy Associate Superintendent
Arizona Department of Education, Health & Nutrition Unit

Nicholas Dunford, Financial Services Director
Arizona Department of Education, Health & Nutrition Unit

Original Signed

Date: November 9, 2009

RE: Update to CN# 04-10

Please be advised that the procurement questions from August 21, 2009 (CN 04-10) are being revised. This new set of procurement questions supersedes the previous set, as a change has been made to the second Q&A under "Local Purchasing."

FSMC CONTRACTS

Q: May a Food Service Management Company (FSMC) have a role in the procurement of a technology system for a School Food Authority (SFA) if the FSMC has a business interest or corporate relationship in one or more technology companies which might compete in the procurement?

A: Yes, in some circumstances an FSMC could have a role in the procurement by an SFA as described. The United States Department of Agriculture (USDA) first responded to this type of procurement question in a May 24, 2005 and a July 14, 2005 memorandum to Regional Directors. See below:
http://www.fns.usda.gov/cnd/governance/Policy-Memos/2005/2005-05-24.pdf
http://www.fns.usda.gov/cnd/governance/Policy-Memos/2005/2005-07-05.pdf

In a question from the July 2005 memo, the USDA discussed a scenario in which an SFA sought to amend an existing contract with an FSMC to add a new deliverable such as a Point of Service

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(POS) system. In this current question, the procurement is being designed prior to solicitation. Below are two examples of circumstances in which an FSMC could have a role in the procurement of an SFA's POS system:

1. *An SFA structures its solicitation for goods and services to include both the services of an FSMC and a POS system.*

   This is allowable if the solicitation clarifies that the POS system would be used at the same time and during the duration of the SFA and FSMC contract and that the SFA would take no ownership interest or option in the POS system procured. The solicitation would allow all respondents the same opportunity to bid/offer on both the FSMC services and the POS system. Depending upon the solicitation, the FSMC could provide their own system or respond using the system of a preferred provider with which they may have a pre-existing relationship.

   In this scenario, because the SFA would not "own" the POS system, it is essential to anticipate how to terminate agreements and retain open competition.

2. *After contract award, the SFA requests that the successful FSMC provide the additional service of procuring a POS system for the SFA.*

   This is allowable as long as the original solicitation included among the duties for the successful FSMC to act as the purchasing agent for the SFA. The FSMC may procure a POS system for the SFA even if the original solicitation did not identify this specific procurement responsibility, as long as the contract identified the FSMC as the purchasing agent for the SFA. Pursuant to applicable program requirements, including those found at 7 CFR Parts 210 and 3016, the FSMC would undertake procurement of a POS system as the SFA's agent.

   All SFA procurements using federal funds are to be conducted with full and open competition. As noted in the July 2005 memorandum, Departmental regulations at 7 CFR 3016 prohibit the participation of an employee, officer or agent in the award or administration of a contract (this includes developing or drafting specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or subgrantee in conducting a procurement).

   Please note that even if an FSMC's services have been properly procured and the scope of services include acting as the SFA's purchasing agent, the FSMC and its subsidiary may not submit a bid or offer in response to a solicitation for a technology system. In this situation where the successful FSMC has a business interest in or a corporate relationship with a POS system provider, that provider may not be deemed a responsive bidder on the procurement administered by the FSMC, as this would create a conflict of interest. Though these entities with whom the FSMC has a business interest cannot bid, the FSMC may still act as the procurement agent for the SFA.

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Q: Is the SFA liable if reports and documents, used in support of meal claims and prepared by the FSMC, are determined to be inaccurate?

A: Program regulations at 7 CFR 210.16(a)(5) require that an SFA contracting with an FSMC shall "[r]etain signature authority on the Arizona Department of Education (ADE)-SFA agreement, free and reduced price policy statements and claims" (emphasis supplied). Pursuant to 7 CFR 210.16(c)(1), under its contract with an SFA, an FSMC must maintain records needed by the SFA in submitting its Claim for Reimbursement required by 7 CFR 210.15(a)(1) and must report that information to the SFA at least monthly. In accordance with program regulations at 7 CFR 210.3(d) and 210.9(b)(8), an SFA is responsible for the all aspects of program management.

The SFA is responsible for having its own official review, and analyzing and signing the Claim for Reimbursement. In the event that there is a "failure to submit accurate claims [it] will result in the recovery of an over-claim and may result in the withholding of payments, suspension or termination" of the SFA's program participation [7 CFR 210.9(b)(8).]

Recognizing that all contracts—including small purchase acquisition contracts—may provide for legal and financial remedies for nonperformance, USDA understand that some SFAs include in their contracts with FSMCs a provision requiring that the SFA be made whole for any losses resulting from over-claims based on inaccurate information provided by the FSMC. USDA regulations do not prohibit such provisions, and it is the responsibility of the SFA to enforce this provision when included in the contract.

LOCAL PURCHASING

Q: According to the new Farm Bill regulations, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products. Does this mean competition does not need to occur and schools can simply pick a farmer to provide them with fresh, unprocessed vegetables?

A: No. The most important principle to a good procurement is that it is competitive and allows for free-and-open competition. An institution must still get quotes from several farmers when procuring unprocessed locally grown or locally raised agricultural products, so that competitors have an opportunity to compete for the bid. The way in which a geographic preference is applied could depend on whether the procurement method is informal or formal. If informal, i.e. falling below the small purchase threshold, a SFA may simply want to approach approximately 3-4 local producers and obtain price quotes. Competition is ensured by developing a solicitation that contains criteria which all the respondents will be subject to. If the procurement exceeds the small purchase threshold, a formal procurement method must be used which would involve the sealed bidding process (i.e. IFB) or the competitive negotiation process (i.e. RFP). This would entail public notification of the solicitation; however, when procuring locally unprocessed agricultural products the notification may be focused on the locale in which the school is situated as a criteria of the solicitation. In a situation where the solicitation for locally unprocessed agricultural products is in fact open to offerors beyond the local area, a way in which to apply a

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geographic preference is to grant preference points to the local farmers who respond to the solicitation.

Q: The Joint Explanatory Statement accompanying the new Farm Bill legislation states that de minimis handling and preparation might be necessary to present an agricultural product to a SFA in a useable form, such as washing vegetables, bagging greens, butchering livestock and poultry, pasteurizing milk, and putting eggs in a carton. Additionally, consistent with FNS guidance, geographic preference may only be applied to the procurement of unprocessed agricultural products which are locally grown and locally raised, and that have not been cooked, seasoned, frozen, canned, or combined with any other products. Does produce that has been chopped or cut fall into the category of "minimal handling and preparation necessary to present in a useable form?"

A: Unprocessed agricultural products that have been chopped, cut, sliced, diced or shucked do meet the parameters of unprocessed as used in the Farm Bill. Therefore, SFAs and other service institutions may use a geographic preference when procuring those agricultural products. See CN-18 for more information.

Q: Is processing meat into a hamburger patty allowed under this rule?

A: No. Grinding meat into a hamburger is considered "processing" and therefore geographic preference may not be applied to this product. Livestock and poultry can only be butchered in order to still be considered "unprocessed".

Q: According to the new Farm Bill regulations, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring unprocessed locally grown or raised agricultural products. How is "local" defined? For example, could a school only accept bids/offers for unprocessed agricultural products from local farmers within a 50 mile radius?

A: Due to the geographic diversity in each State, the institution responsible for the procurement has the discretion to define the area for any geographic preference (e.g., State, county, region, etc.). However, it is important to keep in mind that local preference should not be defined in a way that unnecessarily limits competition.

BUY AMERICAN

Q: Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a Buy American provision, Section 12(n) of the NSLA (42 USC 1760(n)) requiring that a SFA, to the maximum extent practicable, purchases domestic commodities or products. Does this provision extend to other products like paper plates, equipment, or software?

A: No. The Buy American provision applies to domestic commodities or products, meaning an agricultural commodity that is produced in the United States, and a food product that is

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processed in the United States substantially using agricultural commodities that are produced in the United States.

Q: A report accompanying the Buy American provision also states that a food product processed in the United States "substantially" using agricultural commodities produced in the United States means that over 51% of the final processed product consists of agricultural commodities that were grown domestically. Should the packaging of a product be factored in as a portion of this final processed product?

A: No. The packaging of a product is not included in the requirement that over 51% of the final processed product consists of domestic agricultural commodities.

TRANSFERRING EQUIPMENT

Q: A new charter school in a district is starting its operations using a public school building; however, the district stripped the building of all food equipment, desks and chairs, etc. The State would like to survey other districts in the area in search of surplus equipment used in connection with other Federal programs to ensure the charter school is able to provide meals under the National School Lunch (NSLP) and School Breakfast Programs (SBP). The charter school does have an agreement with the ADE to participate in the programs provided they get the equipment. Is it permissible for the charter school to receive surplus equipment that is transferred from the public schools?

A: If the charter school plans to participate in both the NSLP and SBP, then yes, it is fine for the State to locate surplus equipment to ensure that the charter school can function and provide meals under these programs. According to 3016.32(c)(1), when the equipment is no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency. Therefore, since the charter school is seeking surplus equipment for the purpose of being utilized in a federally sponsored activity (that is, school food service), this transaction is acceptable.

Q: Can a school board sell school food service equipment to a non-profit organization for less than the market value?

A: It depends upon the current per-unit fair market value. 7 CFR 3016.32(e)(1) sets forth that items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold, or otherwise disposed of with no further obligation to the awarding agency. This means that as long as the current fair market value of the equipment is less than $5,000, it may be sold for less than the market value. However, 7 CFR 3016.32(e)(2) states that items of equipment with a current per-unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have the right to an amount calculated by multiplying the current market value or proceeds from the sale by the awarding agency's share of the equipment.

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COMMODITIES

Q: If FSMC contracts were just re-bid for SY 2009 (i.e., the school year that extends from July 1, 2008 to June 30, 2009) in accordance with the implementation schedule in the final rule, "Procurement Requirements for the NSLP, SBP and Special Milk Programs (SMP) " (as published in the Federal Register on October 31, 2001), must the contracts be re-bid *again* for SY 2010 to comply with the implementation schedule in the FSMC final rule which was published in the Federal Register on August 8, 2008?

A: 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 ADE approval, to extend the contract for one more 12-month period (i.e. through SY 2010).

Q: An SFA has competitively procured a contract with a distributor for its food for the school year and the market list includes many items. The SFA is notified that some other items are available as commodities. The SFA accepts the offer for the commodities but must have them processed for use in their school lunch program. Does the SFA have to bid the processing of the commodities or can they use the processor that the winning distributor has a contract with?

A: If the processing of these products is in a quantity significant enough to constitute a material change and/or there is a disproportionate amount of commodities that become available, then the processing of the commodities may need to be rebid. However, the decision regarding whether or not a change to a contract is material rests with the SFA. In general, a material change can be thought of as a change made to a contract after it has been awarded that alters the terms and conditions of that contract substantially enough, to the extent that had other offerors known of these changes in advance, they could have bid differently and more competitively. Therefore, the SFA needs to consider the change in the context of the solicitation and the resulting contract. The ultimate decision, however, lies with the SFA and the SFA must document their rationale to support their decision. Additionally, SFAs need to be aware that unless explicitly stated in the contract, a processor may be under no obligation to accept the products for processing. It is important to note, however, that the USDA believes some flexibility is appropriate so that commodities can be utilized efficiently.

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GENERAL PROCUREMENT QUESTIONS

Q: If a contract already has language requiring the return of rebates, discounts, and credits, must the SFA still re-bid in accordance with the implementation schedule in the final rule, "Procurement Requirements for the NSLP, SBP, and SMP"?

A: 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 and re-bidding of the contract is not required.

The SFA and ADE 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.

Q: What if the contract contains the language for the return of rebates, discounts, and applicable credits, but does NOT contain a provision including the methodology for tracking how the invoices will identify these rebates?

A: The rule requires contractors to provide sufficient information to permit the SFA 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, ADE approval should be sought.

Q: Can an SFA purchase directly from a Buying Organization or Group?

A: SFA's are not prohibited from purchasing from a buying organization or group, as long as they comply with the government-wide procurement rules at 7 CFR 3016 and 7 CFR 3019. However, an SFA cannot purchase directly from a buying organization without considering other sources. Depending on whether the procurement is informal or formal, the appropriate competition must take place to ensure that the SFA is obtaining the lowest responsive bid or offer. Joining or procuring directly from a buying service without opening up competition to other like sources does not ensure that the lowest responsive bid or offer has been obtained. The prices of a buying group or organization could be factored in and assessed against other offerors.

If you have any questions or concerns regarding this memo, please contact the Health and Nutrition Unit, Contracts Management Officer, Ellen Pimental at (602) 542-6208 or email at Ellen.pimental@azed.gov.

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