United States Department of Agriculture

Food and Nutrition Service

Contracting with Food Service Management Companies:

Guidance for School Food Authorities

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Contents

Introduction

Under their agreements with a State agency (SA), school food authorities (SFAs) are responsible for operating the school nutrition programs in schools under their jurisdiction. These programs include the National School Lunch Program (NSLP), the School Breakfast Program (SBP), and the Special Milk Program for Children (SMP). To assist in carrying out this responsibility, a SFA may contract with a food service management company (FSMC) to manage the food service operation involving these programs in one or more of its schools.

SFAs must comply with existing Federal, State and local procurement requirements when obtaining the services of a FSMC. Federal procurement requirements are found at 7 CFR Part 3016.36 and 3019.40. The NSLP regulations appear at 7 CFR Part 210, the SBP regulations appear at 7 CFR Part 220, the SMP regulations appear at 7 CFR Part 215 and regulations for the distribution of donated foods at 7 CFR Part 250. This guidance presents an overview of the Federal standards for SFAs and SAs. As provided in 7 CFR 210.19(e), SAs may impose additional requirements which meet or exceed the required Federal standards. Additionally, State and local procurement standards take precedence over those suggested practices set forth in this guidance which are not required by Federal regulations. A SFA should contact its SA for guidance before entering into any procurement of FSMC services.

In order to make an informed decision about whether contracting with a FSMC will provide the SFA with the best food service operation available, the SFA should consider a number of issues. These issues include the financial, administrative and operational activities that will be affected by contracting. The SFA should allow sufficient time to identify and analyze these issues and to prepare for conversion from operating the food service to using a FSMC. Ideally, this process should start one full year before the FSMC begins operations.

In contracting with a FSMC, the SFA must use procurement procedures and documents that provide adequate safeguards for the SFA, as well as ensure that the FSMC operates the food service in accordance with the objectives of the SFA. The SFA should have a sufficient number of knowledgeable staff to coordinate, monitor, review, and control food service operations and to perform the responsibilities that must be retained by the SFA.

The following guidance identifies items that should be considered in deciding whether to use a FSMC, the actions that should be taken once a decision to use a FSMC has been made, and the responsibilities of the SFA after the SFA-FSMC contract becomes operational. This guidance is not all–inclusive. Each SFA and SA will have unique circumstances that should be evaluated.

Chapter 1:

Responsibilities and Considerations

Deciding to Use a FSMC

The following steps should be undertaken when considering the use of a FSMC:

Analyze Food Service Operation—conduct an analysis of the current food service operation to determine what method of providing food service best meets the SFA's goals and objectives, i.e.:

- Identify the current cost of operating the food service.
- Determine all cost elements that will be affected by contracting with a FSMC. These could include personnel costs, food costs, other labor costs and contractual obligations that must be met by the SFA regardless of whether a FSMC is used.
- Analyze all non-fiscal aspects of the current food service operation to determine the impact of utilizing a FSMC (e.g., nutrition goals and nutrition education activities).
- Identify the functions that might be contracted, and the pros and cons of contracting each.

Contact SA/State Distributing Agency—contact the SA to obtain information on FSMCs operating within the State, the names of SFAs currently using FSMCs, and State requirements and technical assistance if needed.

Contact the State Distributing agency to determine under what situations a FSMC would be subject to the provisions of 7 CFR Part 250, Subparts C and D with respect to the processing of USDA donated foods. If subject to these provisions, the SFA must ensure that the State Distributing agency has reviewed and approved any processing agreement prior to the delivery of USDA donated foods for processing.

Contact Other SFAs—contact other SFAs using FSMCs for technical assistance.

SFA Responsibilities

If the SFA uses a FSMC, the SFA must remain responsible for the overall operation of the school nutrition programs. This responsibility requires that the SFA retain and maintain direct involvement in the operation of the food service and not delegate certain responsibilities to the FSMC. The SFA must also:

Preparation of Contract Documents—prepare all contract documents issued prior to the award of the SFA-FSMC contract. These documents include, but are not limited to: bid specifications, the invitation for bid (IFB), the request for proposal (RFP), and the SFA-FSMC contract, as applicable. Section 210.16(c)(3) specifically addresses the SFA's development of specifications for each food component or menu item and requires these specifications to be included in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time. In order to ensure objective contractor performance and eliminate unfair competitive advantage, a person that develops or drafts 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 under the USDA entitlement programs specified in 7 CFR Part 3016.4(b) shall be excluded from competing for such procurements.

Contract Review—ensure that the SA annually reviews each contract (including all supporting documentation) between any SFA and FSMC prior to execution of the contract to ensure compliance with all the provisions and standards set forth in this part and in Part 250, Subpart D. As set forth in 210.19(a)(6), when the SA develops a prototype contract for use by the SFA that meets the required provisions and standards, this annual review may be limited to changes made to that contract. Each SA shall review each contract amendment between a SFA and FSMC to ensure compliance with all provisions and standards set forth in this part and in Part 250, Subpart D before execution of the amended contract by either party. The SA may establish due dates for the submission of the contract or contract amendment documents. (See the Section on Developing Contract Documents for recent changes)

An important change made by the procurement regulation is that all contracts must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and applicable credits. SFAs should include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: Only 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 [210.21(f)(1)(i)].

Ensure that SA approved FSMC prototype contracts meet the provisions of the governing regulations and that all changes the SFA makes to the prototype contract are reviewed and approved annually by the SA and prior to execution of the contract.

Program Oversight—ensure that the food service is in conformance with the SFA's agreement with the SA and that responsibility for all contractual agreements entered into in connection with the school nutrition programs remains with the SFA. Resolve program review and audit findings.

Monitoring—monitor the food service operation through periodic on-site visits, including in accordance with 7 CFR 250.51(d), assurance that the FSMC uses USDA donated foods, or, as applicable, commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods. [See 7 CFR Part 210.16(a)(3)]

Control the Quality, Extent and Nature of Food Service—retain control of the quality, extent and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR Part 210; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors must be paid to the SFA.

Signature Authority—retain signature authority on the agreement to participate in the NSLP, the SBP and the SMP, including the SFA's free and reduced price policy statement and the Claim for Reimbursement.

Free and Reduced Price Meal Process—maintain responsibility for implementation of free and reduced price policy in accordance with 7 CFR Part 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and reduced price meals. An employee of the food service management company may perform for the SFA in various aspects of the application, certification, and verification process of eligibility for school meals programs. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA.

USDA Donated Foods—retain title to USDA donated foods. The SFA ensures that all USDA donated foods received by the SFA and made available to the FSMC, including processed USDA donated foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. This provision also applies to any refunds received from processors. The SFA must ensure that the FSMC has credited it for the value of all donated foods received for use in the meal service in the school year, in accordance with 7 CFR 250.51(a) and (b).

Health Certification—maintain applicable health certification(s) and assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility.

Establishment of an Advisory Board—establish and maintain an advisory board composed of parents, teachers and students to assist in menu planning.

Development of the 21-Day Cycle Menu—develop the 21-day cycle menu for the FSMC bid proposal. If the SFA determines, and the SA agrees, that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation up front. The solicitation should identify the criteria that the SFA will use to evaluate the FSMC's menu, such as affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

However, FSMC-developed cycle menus are only appropriate to use under the competitive negotiation method of procurement, since under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

Internal Controls—apply the internal control procedures required by 7 CFR 210.8(a) to the preparation of the monthly Claim for Reimbursement.

Reports—complete all reports as required by the SA.

Identify Scope of Contract

Each procurement takes time and requires a great deal of thought and planning. Once the decision to hire a FSMC has been made, there are many factors that must be considered. The SFA must:

Identify Scope of Work—determine the general extent or scope of work to be performed by the FSMC, i.e.:

- Identify which Federally reimbursable program(s) or nonprofit food service activities the FSMC will be involved in, e.g., NSLP, SBP, a la carte sales during and/or between meal service periods, after hours snacks under the NSLP or meal/snack service under the Child and Adult Care Food Program/Summer Food Service Program.
- Decide if the operation of any SFA vending machines will be turned over to the FSMC.
- Decide if the FSMC will cater any special activities and/or be involved in any food service activity outside the nonprofit food service.
- Decide what specific activities relating to USDA donated foods the FSMC will be required to perform, in accordance with 7 CFR 250.50(d). Such activities may include, for example:

    1) The procurement of processed end products (i.e., containing donated foods) on behalf of the SFA (Such procurements must ensure compliance with the requirements in 7 CFR Part 250,

Subpart C, and with processing agreements between the processor and distributing agency or SFA). Please note that SFAs should pay careful attention to their solicitation and subsequent contract to ensure that they have allowed for the acceptance and processing of commodities.

2) Ordering or selection of donated foods, in coordination with the SFA.

3) Storage and inventory management of donated foods.

4) The payment of processing fees or submittal of refund requests to to a processor on behalf of the SFA, or remittance of refunds for the value of donated foods in processed end products to the SFA, in accordance with the requirements in 7 CFR Part 250, Subpart C.

Identify Responsible Personnel—identify SFA personnel responsible for managing the SFA-FSMC contract and meeting the SFA's responsibilities, including the existing responsibilities that cannot be delegated to the FSMC and the new responsibilities that will occur under the SFA-FSMC contract.

Select Method of Procurement—decide which method of procurement (i.e., sealed bid or competitive negotiation) to use in accordance with Federal, State and local requirements and the SFA's needs. See Chapter 2 for details. Be mindful of the method chosen and ensure that the processes associated with that method are employed. For example, when using the sealed bid process, don't refer to it as a Request for Proposal if the actual term is Invitation for Bid.

Develop Contract Documents—for competitive sealed bid procurement, the contract document is the IFB which includes specifications and pertinent attachments which clearly define the items and services. The contract should be issued as part of the IFB. Under competitive negotiation, all non–negotiable components of the contract should also be included in the RFP. In either type of procurement, the contract or contract provisions should be reviewed by the SFA's legal counsel to ensure legal sufficiency as well as to provide the maximum amount of protection possible to the SFA.

In accordance with new FSMC regulation "Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentives Program, and Charitable Institutions" issued on August 8, 2008, all contracts must include the provisions relating to donated foods in 7 CFR

250.53, as applicable.

In the solicitation and contract, it is crucial for SFAs to provide specific information about the food service and all the goods and services they are seeking to procure. For example, essential information includes the number of school buildings, meal prices, number of students available for lunch, meal preparation facilities, number of serving days, historical information on quantities/types of USDA donated foods available, Federal/State reimbursement rates, meal service hours, food service and serving methods, number of meal service periods, commodity usage, estimated serving counts, personnel salaries and benefits, total revenues, total operating costs, etc.

It is also important for an SFA to ensure that the solicitation encompasses all the goods and services they foresee in the near future, so that changes do not need to be made to the contract soon after execution. For example, if an SFA foresees the possibility of adding a school breakfast program to their food program in the next few months after the contract will be executed, they should be sure to account for this in their original solicitation.

SFAs must not use information prepared by FSMCs in the IFB or RFP. For example, open and free competition can not be compromised by providing product specifications on "brand name" products that only one FSMC or its distributor can supply.

FSMC-developed contracts are never allowed since they would compromise open and free competition. While not recommended, a SFA may invite the successful offeror under a RFP to assist in finalizing the contract provisions after the successful offeror has been identified. Such changes cannot result in a material change to either the solicitation or contract.

New regulations governing procurement requirements in the NSLP, SBP, and SMP, issued on October 31, 2007 made an important modification to the requirements found at 7 CFR 210.19. As <u>previously</u> worded, the regulations permitted State agencies to make their first review of such contracts at any time during the first year of the contract.

It is important to remember that the <u>new regulations</u> in section 210.19(a)(6) require each SA to annually review each contract (including all supporting documentation) between any SFA and FSMC <u>prior to execution (i.e. prior to signature)</u> of the contract to ensure compliance with all the provisions and standards set forth in this part and in Part 250, Subpart D. This change is meant to ensure that contracts containing unallowable terms and conditions are corrected prior to the contract being executed.

When developing the contract document, it is also important to ensure that the contract <u>must</u> contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. SFAs should include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: Only allowable costs will be paid from the nonprofit school food service account. Such costs must be 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.

This 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 applicable credits on invoices and bills presented for payment to the school food authority. (7 CFR Part 210.21) It is important that SFAs ensure that the contract contain this requirement so that the contractor is transparent in their identification of these rebates, discounts, and credits.

When the SFA is using a prototype contract developed by the SA that meets the required provisions and standards, this annual review may be limited to the changes that are made to that prototype contract. Each SA shall review and approve each contract amendment between a SFA and FSMC to ensure compliance with all provisions and standards set forth in this part <u>and</u> in Part 250, Subpart D before execution of the amended contract by either party. The SA may establish due dates for the submission of the contract or contract amendment documents.

Chapter 2:

Procurement

Open and Free Competition

The underlying foundation of all procurement, without regard to dollar value, is that regardless of the method used, the procurement must be conducted in a manner that provides maximum open and free competition. Procurement procedures must not restrict or eliminate competition. Examples of such restrictions include, but are not limited to:

Unreasonable Requirements—placing unreasonable requirements on firms in order for them to qualify to do business, e.g., requiring unnecessary experience and bonding requirements.

Noncompetitive Practices—encouraging or fostering noncompetitive practices, e.g., collusion between firms.

Conflicts of Interest—allowing conflicts of interest to occur. Conflicts of interest can occur when the individual(s) responsible for determining bid/proposal responsiveness can be overruled by other individuals within the organization or if the individual responsible for determining responsiveness (or any member of his or her family) has any personal or corporate ties or any financial interest in any of the offering firms.

Inappropriate Practices—using information prepared by FSMCs in the IFB or RFP; entering into negotiations with a firm prior to evaluating proposals; negotiating with any bidder at any time when the competitive sealed bid procurement method is used; and providing only certain firms with the results of pre–bid meetings or releasing the contents of a bid proposal to other bidders/proposal offerors.

Insufficient Time—not allowing bidders/offerors sufficient submission time when advertising/soliciting the IFB/RFP.

Geographic Preferences—allowing geographic preference to occur without following Federal regulations. Even if there are State or local laws for geographic preferences, in-State or local geographic preferences are prohibited in Federal procurements except where applicable Federal laws expressly permit their use.

The recently enacted Food, Conservation, and Energy Act of 2008 (P.L.

110-246), also known as the Farm Bill, amended the National School Lunch Act to allow institutions receiving funds through the Child Nutrition Programs to apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products.

Unprocessed products are those products that have not been cooked, seasoned, frozen, canned, or combined with any other products. Acceptable useable forms of these unprocessed products include: "washing vegetables, bagging greens, butchering livestock and poultry, pasteurizing milk, and putting eggs in a carton."

While the statute permits institutions to apply a geographic preference to the maximum extent practicable and appropriate, it does not require institutions to purchase locally grown and locally raised agricultural products, or to apply a geographic preference in their procurements of these products. Moreover, States cannot mandate through law or policy that institutions apply a geographic preference when conducting these procurements, because the NSLA grants this authority directly to the institutions. The institution responsible for the procurement has the discretion to determine whether and how a geographic preference meets its needs

Procurement Methods

After the SFA plans for the procurement, they must solicit for bids or proposals to ensure that they receive the best possible product at the lowest possible price. The SFA must identify which procurement method meets its needs most effectively. The two most frequently used methods of procurement for contracting with a FSMC are:

Competitive Sealed Bids, i.e. an invitation for bid means a formal method of procurement in which sealed bids are publicly solicited, i.e. through and invitation for bid, resulting in the award of a firm-fixed price contract to the responsible bidder whose bid is responsive to the IFB, conforms with all the material terms and conditions of the invitation for bids, and is lowest in price. In this case, the IFB must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids.

Competitive Proposals (previously known as Competitive Negotiation), i.e. a request for proposal, is a method of procurement whereby a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal. While price alone

is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method.
The two other methods of procurement, Small Purchase and Noncompetitive Negotiation, are limited to specific situations and should not be used unless expressly approved by the SA.

Competitive Sealed Bids

Procurement of tangible items such as food or food service often lend themselves to the formal procurement method known as competitive sealed bids. The reason the procurement of goods or products often lends itself to this method is that an SFA can choose a contractor solely on the basis of cost and does not need to negotiate with the bidders. The nature of the product the SFA is buying is such that, if all bids are responsive to the published specifications, they will differ along no dimension other than price.

Factors to Consider—Factors to consider for using competitive sealed bids are:

Fixed Scope of Services—the SFA has identified exactly which services and costs it wishes to contract out to the FSMC.

Legal Advice Needed—the SFA should obtain legal advice in the development of a contract for inclusion in the IFB.

No Negotiation Involved—the SFA either does not wish to or lacks the needed experience to negotiate price and contractual responsibilities with the FSMC.

Competition Available—more than one FSMC is willing and able to compete effectively for the contract.

Fixed-Price Bids Mandated—the SA mandates fixed-price bids.

Responsible/Responsive Bidder—the bid will be awarded to the responsive/responsible bidder that submits the lowest responsive bid.

The SFA must include sufficient information in the IFB to allow bidders to properly respond to the IFB, thus enabling the SFA to determine responsiveness. The SFA must use responsiveness criteria that are measurable. Normally this means establishing minimum levels. The IFB must also indicate how bidders will demonstrate compliance with these criteria. For example, if an IFB requires a copy of the food handler's license, the bidder should provide it as requested. Open–ended criteria cannot be used in IFBs.

In determining whether a responsive bidder is also a responsible bidder, factors such as contractor integrity and prior working relationships with the firm can be used as well as contractor experience and financial and technical resources.

Needed Information—the place and time the bids will be opened and the award made must be included in the invitation as well as any information concerning pre-bid meetings and the need for board approval of the selected bidder. If bid and/or performance bonds will be required, the amount, any requirements concerning the bonding firm, and when the bond(s) must be provided to the SFA must be included in the invitation.

Advantages—The advantages of using competitive sealed bids include:

Advance Preparation—the contract is prepared prior to soliciting bids. This generally allows the SFA to more accurately estimate costs and assign staff resources well in advance of the effective date of the contract.

The pre–bid preparation of the contract also permits the SFA to arrange for its legal authorities to review the contract provisions for legal sufficiency without the pressures of negotiation.

Again, because the contract is prepared prior to soliciting bids, the SA review of the contract may be completed prior to announcing the IFB, this allows the SFA to award the contract immediately after the bid opening, pending board approval, if applicable.

Easier Identification of Revenues and Expenses—fixed-price contracts more easily permit the SFA to identify anticipated revenues and expenses, as well as the total anticipated cost of the contract.

No Negotiation Responsibilities—the SFA is relieved from negotiating both the cost and responsibilities with bidders.

Simplified Monitoring—the monitoring of the status of the nonprofit food service account is not difficult. Transactions are restricted to processing billings from and payments to the FSMC; the FSMC does not pass costs on to the SFAs.

Disadvantages—The disadvantages of using competitive sealed bids are:

Demands Precise Identification of Needs—if the bid document does not clearly identify the services requested, the bid prices and the services provided by the FSMC may not be reasonable or responsive to the SFA's needs.

May Limit Competition—during periods of rapidly rising prices, prospective bidders may decline to bid on a fixed-price basis or bid overly high. In situations where prices are declining, fixed-price contracts do not allow the SFA to benefit from the decline.

Competitive Negotiation

Competitive negotiation is effective when the SFA has identified what it expects a FSMC to accomplish. Typically, an SFA would generally choose competitive negotiation when they are procuring services that may differ along dimensions other than price. This process is most often used when the basis for award is not solely dependent upon the lowest cost but other factors as well.

Unlike the competitive sealed bidding method, the competitive negotiation method allows more flexibility when awarding the contract, as the SFA may engage in discussions with respondents after evaluating their proposals.

The resulting contract from a competitive negotiation may be fixed-price or cost-reimbursable. Unlike the cost-plus-fixed-fee method, "cost-plus-a-percentage-of-cost" or "cost-plus-a-percentage-of-income" contracting is <u>not</u> permitted.

Factors for Consideration—Factors to consider when using competitive negotiation are:

Technical Skills Needed—the SFA <u>must</u> possess the technical skills necessary to evaluate the proposals and negotiate with the offerors. These skills usually include knowledge of procurement and contracting, school food service, and financial management.

Legal Advice Needed—while the SFA must prepare a descriptive RFP, the actual contract will not be prepared until after the proposals are evaluated. As a result, the SFA's legal authority should be available to assure that the proposed contractual language reflects the agreement reached between the successful offeror and the SFA.

Monitoring Costs Required—under a cost-reimbursable contract, the SFA must independently monitor the costs incurred under the contract for compliance with 7 CFR Part 3015, Subpart T.

Careful Preparation of Evaluation Criteria—the criteria that will be used to evaluate the proposals, and their weights, must be carefully prepared and included in the RFP. These criteria must be followed in evaluating the proposals. Negotiations will then be conducted with those offerors who exceed a pre-determined "cut-off" score.

Requires Inclusion of All Pertinent Information—the due date for proposal submission must be included in the request as well as any information concerning pre-proposal meetings and the need for board approval of the selected offeror. If a performance bond will be required, the amount, any requirements concerning the bonding firm, and when the bond must be provided to the SFA, must be included in the proposal.

Advantages—The advantages of using competitive negotiation are:

Flexibility in Assigning Responsibilities—based upon the responses received from the offerors, the SFA decides which functions will be performed by the FSMC. SFAs must ensure that the SFA responsibilities specified in Chapter 1 are not delegated to the FSMC.

SFAs Benefit During Periods of Falling Prices—RFPs that result in cost-reimbursable contracts allow the SFA to take advantage of price declines during periods of falling prices.

Greater Flexibility in Selecting FSMC—the SFA has somewhat more flexibility in selecting a FSMC because the SFA is not limited to selecting the offeror that submits the lowest price bid.

Disadvantages—The disadvantages of using competitive negotiation are:

Complex Monitoring—the monitoring of revenue and expenses under the contract will be more complex because:

- The Federal cost principles referenced in 7 CFR Part 3016.22(b) apply to cost-type contracts. In addition, 7 CFR Section 210.21(f) highlights requirements for contractors billing SFAs under cost-reimbursable contracts. The SFA must review specific items of cost the FSMC charges to the food service account for conformity to these cost principles.

- The timing of expenses will affect the status of the food service account. If the FSMC records expenses on the cash basis of accounting and bills the SFA accordingly, it will bill for goods and services at the time they are purchased. Under the accrual basis of accounting, the FSMC would record expenses and bill the SFA when the goods are actually used in the food service operation.

- The accrual basis of accounting is the preferred method because it measures the benefits received from the FSMC's purchases. Cash basis billing can distort this measurement. It can generate overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The SFA can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the SFA must recalculate the adjustment entry each month.

Unbudgeted Costs During Periods of Rising Prices—RFPs that result in cost-reimbursable contracts may result in additional costs to the SFA during periods of rising prices.

Potential Reopening of Negotiations—under a RFP, the contract is prepared based upon the negotiations. The contract should not be finalized until the SA reviews the document. If deficiencies are noted, it may be necessary for the SFA to reopen negotiations.

Essential Skill and Experience—the negotiation process requires that the SFA possess significant skill and experience in negotiating, contracting and financial management. It may be necessary for the SFA to hire individuals to provide the needed expertise, which can be cost prohibitive. Attempting to negotiate without the needed expertise can result in the SFA entering into a contract that meets regulatory requirements and is fully enforceable, but is detrimental to the SFA.

Unexpected Responsibilities—to the extent that the SFA has not identified whether it or the FSMC will perform certain functions, the SFA may incur duties and related costs not planned or budgeted.

Chapter 3:

Characteristics of a Comprehensive Agreement

Authority

Section 210.16(c) states "Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met." These provisions are expanded upon below to incorporate program policies, pertinent regulatory requirements, and guidance. Some of the required provisions are based upon the dollar threshold of the contract. In such cases, the total dollar value of the contract must be considered, e.g., in the case of a cost-reimbursable contract, the total value of the contract must reflect the management fee as well as the direct costs incurred by the FSMC which are billed to the SFA, such as food and labor.

Required vs. Suggested

Every effort has been made to distinguish between required and suggested contract provisions. Provisions typed in *italics* are Federal requirements that must appear in the contract documents. Regardless of whether a provision is required to actually appear in the contract documents, SFAs are required to ensure that the food service is operated in accordance with program regulations.

SFAs are urged to include additional provisions that supplement those regulatory provisions that must appear in the contract to ensure that the best interest of the SFA is served, provided that such provisions are not inconsistent with program regulations. Such provisions may include, competitive purchasing to obtain the best price and quality of food, extending the required controls of USDA donated foods to purchased food as well, and requiring FSMCs to comply with the intent of Federal procurement and cost principles.

General Provisions

A comprehensive contractual agreement covers a wide range of areas that delineate both the SFA and FSMC responsibilities:

Compliance with State and Federal Regulations—The Code of Federal Regulations (CFR) provides rules that SFAs must observe if they are to participate in the NSLP, the SBP, the SMP, and other meal programs. All contracts should require that the FSMC conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245, 250 and FNS instructions and policies, as applicable. Incorporation of program regulations provides a common basis for performance by the FSMC.

The most effective approach would be to require the FSMC to be in conformance with the applicable portions of the SFA's agreement under the program. *(7 CFR Part 210.16(a)(2))*

Contracts should also contain reference to applicable State regulations, e.g., procurement, health and sanitation requirements.

SFAs may want to consider including an addendum to the SFA-FSMC contract which summarizes Federal and State requirements.

Signature Authority—The SFA retains signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims.
(7 CFR Part 210.16(a)(5)). The SFA also retains signature authority for their free and reduced price policy statement and the monthly Claim for Reimbursement.

Free and Reduced Price Meal Process—The SFA determines eligibility for free and reduced price meals and free milk in accordance with 7 CFR Part 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and reduced price meals.

An employee of the food service management company <u>may perform</u> for the SFA in various aspects of the application, certification and verification process of eligibility for school meals programs. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA and cannot be used or possessed by the food service management company for any use other than to determine eligibility for free or reduced price meals.

USDA Donated Foods—The SFA's agreement must comply with the regulations for the use of USDA donated foods, including:

> **Crediting for the Value of Donated Foods**—In accordance with 7 CFR 250.51(a) and (b), contracts must ensure that the FSMC credits the SFA for the value of all donated foods received for use in the SFA's meal service in the school year, on at least an annual basis, through invoice reductions, refunds, discounts, or other means. Such requirement includes crediting for the value of donated foods

contained in processed end products if the FSMC, in accordance with its contract, procures such end products on behalf of the SFA, or acts as an intermediary in passing the donated food value in such end products on to the SFA. All forms of crediting must include clear documentation of the value received from the donated foods. In cost-reimbursable contracts, crediting may be performed by disclosure; i.e., the FSMC credits the SFA for the value of donated foods by disclosing, in its billing for food costs submitted to the SFA, the savings resulting from the receipt of donated foods for the billing period.

Donated Food Values Required in Crediting—In accordance with 7 CFR 250.51(c), the SFA must ensure that, in crediting it for the value of donated foods, the FSMC uses the donated food values determined by the distributing agency, in accordance with 7 CFR 250.58(e), or, if approved by the distributing agency, donated food values determined by an alternate means of the SFA's choosing. However, the method of determining the donated food values to be used in crediting must be included in procurement documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted.

Use of Donated Foods—In accordance with 7 CFR 250.51(d), the FSMC must use all donated ground beef, donated ground pork, and all processed end products, in the SFA's food service, and must use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the SFA's food service (unless the contract specifically stipulates that the donated foods, and not such commercial substitutes, must be used).

Storage and Inventory Management—The FSMC must meet the general requirements for the storage and inventory management of donated foods in 7 CFR 250.14(b). In accordance with 7 CFR 250.52(a), the FSMC may store and inventory donated foods together with foods it has purchased commercially for the SFA's use, unless this is specifically prohibited in its contract. It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of donated foods in 7 CFR 250.51(d). Additionally, under cost-reimbursable contracts, the FSMC must ensure that its system of inventory management does not result in the SFA being charged for donated foods.

Recordkeeping and Review Requirements—The SFA and FSMC must maintain records of receipt of donated foods and processed end products, of crediting for the value of donated foods, and other records relating to donated foods, in accordance with 7 CFR 250.54. The SFA must conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's food service in the school year, including, in accordance with requirements in 7 CFR 250.51(a), the value of donated foods contained in processed end products.

Monitoring—This should encompass determining whether the food service operation is in conformance with the SFA's agreement to operate the program in accordance with program regulations. Contract language should also confirm the SFA's responsibility to implement internal controls as required under 7 CFR 210.8(a) and to ensure resolution of program review and audit findings.

Use of Advisory Board—If the SFA wishes to have the FSMC work within the advisory board, contract language should identify the specific FSMC responsibilities.

Meal Service Provisions

Contracts should also cover the range of services expected from the FSMC. These services include the types of meals provided by the FSMC and the division of responsibility for the various activities that make up meal services such as food purchasing and storage, preparation, service, management of the SFA's free and reduced price meal tickets, and other related activities. This includes:

Descriptive Information Regarding Food Service—SFAs are encouraged to provide specific information about the food service. Refer to Chapter 1, Identify Scope of Contract, for examples.

Such information may be provided in a fact sheet that accompanies the IFB/RFP or in either the IFB or RFP. It would not be necessary to restate in the contract any information that appears in the IFB or RFP, provided that the IFB or RFP is expressly incorporated into the contract.

Types of Meals to be Provided—Contracts should clearly specify what types of meals and other services will be provided (i.e., lunch, breakfast, a la carte and vending machine sales, adult meals and special event meals), the reimbursement category of those meals, and what programs will be offered. Unless the SFA intends to seek separate bids, the bids should cover all other meal programs administered by the SFA, e.g., the Child and Adult Care Food Program, the Summer Food Service Program and vended meals provided to other SFAs.

21-Day Cycle Menu—Under the competitive sealed bid method, the 21-day cycle menu enables the SFA to review each bid for responsiveness to the bid requirements.

The SFA should develop the 21-day cycle menu for the FSMC bid/proposal. If the SFA determines, and the SA agrees that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation up front..

The SFA must ensure that their solicitation contains information on how the SFA will be evaluating the FSMC's menu, such as affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

However, FSMC-developed cycle menus are only appropriate to use under the competitive negotiation method of procurement, since under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must convey menu adjustment requirements to the FSMC and monitors implementation of those adjustments (e.g., meal pattern changes issued by USDA).
The SFA must also approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

Quality, Extent and General Nature of Food Service:

Specifications—Contract language should also include other standards, such as: applicability of USDA major ingredient specifications, use of the Child Nutrition Labeling Program, and applicability of USDA standards about the use of texturized vegetable protein fillers and extenders.

Samples—SFAs may want to consider including a contract provision that mandates that the FSMC holds meal samples for a 48-hour period (or follow the SFA's requirements) to ensure that the procedures specified in Serving It Safe, are met.

Food Testing—Contracts should also address food testing by the SFA, such as testing portion sizes and food temperature.

Competitive Foods—In accordance with 7 CFR 210.11, SFAs must exert control over the sale of foods sold in competition with school lunch and school breakfast. Included are snacks and beverages sold as part of a la carte meal offering or through vending machines. SFAs may want to address the SFA's position regarding the kinds of foods to be offered, the location of vending machines, the hours of students' access to a la carte and/or vending machines, etc.

SFAs are encouraged to include language which prohibits the sale of foods of minimal nutritional value in the food service area and which fosters the nutritional integrity of the school nutrition programs.

Activities Supporting Meal Services—Contracts for food services should also contain language about activities that support food services, e.g., food purchasing (for cost-type contracts), menu planning, inventory and storage, and nutrition education, if desired.

The SFA must retain control of the quality, extent and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR Part 210; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors must be paid to the SFA.

General—Contracts are strengthened by designating the specific range of services for which the FSMC is responsible. These services may include, serving of meals, processing of meal tickets, meal service at special functions, lunch ticket sales, and food delivery to serving sites.

Financial—Cost-reimbursable contracts for food services should also contain language about payment of vendor bills and accounts. A common approach is for the FSMC to assume responsibility for paying these bills and then invoicing the SFA for the costs. This is consistent with a "cost-reimbursable with a fixed-fee" payment structure.

Contract language must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. SFAs must be sure to include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: 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 [210.21(f)(1)(i)].

Additionally, the SFA must ensure that contractors 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 school food authority [210.21(f)(1)(ii)(A)]. It is important to note that the contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars [(210.21(f)(1)(iii)].

The contractor must be transparent in their identification of these rebates, discounts, and credits [210.21(f)(1)(iii),(iv),(v),(vi].

Contract language should also specify the requirements for back-up documentation that supports the cost reimbursement portion of the invoice, e.g., supplier invoices for food costs, and time and attendance documentation for labor costs. Additionally, the contract should also specify the management controls and accountability procedures, if the SFA advances money at the start of the school year, and for administrative costs charged by the FSMC.

Food Purchasing—In developing a cost-reimbursable solicitation and contract, SFAs should clearly identify a range of controls over purchasing, including whether the FSMC is permitted to purchase from its own subsidiaries, whether the cost of products is the sole determinant for purchase, and how discounts, rebates, and applicable credits are passed through to the SFA. In addition, the SFA must ensure that the FSMC procurement of processed end products (i.e., end products that contain donated foods) is restricted to those processors that have signed processing agreements with the State distributing agency or the SFA, in accordance with 7 CFR Part 250, Subpart C.

If the SFA does the purchasing, clauses that limit the selection of vendors to only FSMC-approved vendors are not permitted. Such clauses have the effect of limiting open and free competition. FSMCs may, however, recommend vendors.

In the case of cost-reimbursable contracts, the SFA should include a provision requiring a FSMC to demonstrate that the prices it is charging the SFA for food, supplies, etc., are reasonable and necessary. Additionally, SFAs should include provisions which require a FSMC to submit documentation periodically (i.e., monthly) that support what the SFA was charged for each product purchased and requiring that allowable costs 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 SFA. The FSMC should make all of the documentation available for inspection by the SFA.. (7 CFR Part 210.21). In addition, the SFA should include a provision that ensures crediting of the SFA for the value of donated foods in processed end products purchased on behalf of the SFA, as applicable.

Food Inventory and Storage—The SFA should also include provisions that specify the particulars of food inventory and storage to identify the responsible party. Responsibility should be clearly delineated to ensure that all needed activities are covered, e.g., who is responsible for food storage and maintenance of inventory and for conducting the initial inventory and the final inventory.

Nutrition Education—If the SFA requires the FSMC to take any responsibility for nutrition education and other non-meal services associated with the meal service component of the FSMC operation, the specific responsibilities should be delineated.

Nondiscrimination—The SFA is always required to ensure that no child is discriminated against on the basis of race, color, national origin, age, sex or disability. Contract language must not diminish the intent of the nondiscrimination provision.

Free and Reduced Price Policy—FSMCs often implement meal-related portions of the free and reduced price policy, such as distributing tickets, obtaining accurate meal counts and preventing overt identification of free and reduced price eligible students. Contracts should include language requiring the FSMC to comply with the SFA's free and reduced price meal policies. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA. The information cannot be used or possessed by the food service management company for any use other than to determine eligibility for free or reduced price meals

Other Considerations—More considerations for inclusion in the contract are:

- Utilization of USDA donated foods on a first-in first-out basis.

- In cost-reimbursable contracts, whether the FSMC bills the SFA for foods when purchased or when used.

- The method by which inventories of supplies are handled at the beginning and end of the contract. For example, if the FSMC bills the SFA for supplies as purchased, rather than as used, the contract should ensure that the FSMC will purchase back unused supplies from the SFA at the conclusion of the contract in order to prevent over-buying.

Financial Provisions

Contracts between SFAs and FSMCs provide the basis for payments and management of the business relationship. SFA oversight is of particular importance given the range of financial terms and conditions of SFA-FSMC contracts, such as fee structures, cost controls and financial management. The financial provisions discussed below all flow through the nonprofit school food service account:

Fee Structures—Federal program regulations permit two types of payment or fee structures in SFA contracts with FSMCs: a fixed-price or fee, and cost-plus-a-fixed-fee. SFAs must ensure that contract provisions are limited to the permissible fee structures.

Fixed-price/fee, which is permissible either under an IFB or RFP, takes the form of a unit charge where the unit may be per meal or per time period, typically a year. For example, the FSMC might charge $1.50 per meal or $50,000 per year. In each instance, the fee charged is expected to cover all operating and administrative costs with no additional charges to the SFA.

A cost-reimbursable contract, which is not permissible under an IFB, permits the FSMC to pass food service operating costs through to the SFA and charge an additional fixed- or flat-fee that covers management and administrative costs.

The fee may be described in different ways, e.g., service fee, management fee, administrative fee, or a combination of any of these. A "cost-plus-fixed-fee" contract may also have multiple fees. There may be a per meal cost and an annual fee. Also one fee might be called an administrative fee and another a management or service fee; typically, the administrative fee represents overhead costs and the management fee represents the profits.

The contract should have enough detail regarding 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 should specify the cost documentation requirements.

Control of the Nonprofit School Food Service Account—Under cost-plus-fixed-fee contracts, all revenue, including refund payments for processed end products, and any expenses that are charged to a SFA must flow through the SFA's food service account(s). Revenue can be used only for the SFA's nonprofit school food service program and cannot accrue to the FSMC. FSMC expenses that are not billed to the SFA cannot be recorded as expenses to the food service account.

A La Carte Conversion (Per Meal Equivalency)—A component of the overall payment structure is the manner in which a la carte food service is counted and valued in a fee per meal contract. In a fee per meal contract, the FSMC is paid on the basis of the number of meals served. In order for a FSMC to be paid for the a la carte food service, many SFAs convert a la carte food service activity into an equitable number of reimbursable lunches. The conversion of the a la carte activity into an equitable number of lunches is termed the "per meal equivalency."

Contracts should define a per meal equivalency that fairly relates to the cost of producing the reimbursable lunch. One means of obtaining the per meal equivalency is by dividing the total cost of producing a la carte items sold by the unit cost of producing a reimbursable lunch.

Absent cost data, the SFA may obtain a per meal equivalency by dividing the a la carte revenue by the per meal sum of the Federal and State free reimbursement plus the value of USDA entitlement and bonus donated foods. A la carte revenue should include all sales to adults and a la carte sales to students.

Adult Meals—Adult meal charges must be established in accordance with FNS Instruction 782-5, Pricing of Adult Meals in the National School Lunch and School Breakfast Programs. Under that instruction, "Breakfasts and lunches served to teachers, administrators, custodians and other adults must be priced so that the adult payment in combination with any per-lunch revenues from other sources designated specifically for the support of adult meals (such as State or local fringe benefit or payroll funds, or funding from voluntary agencies) is sufficient to cover the overall cost of the lunch, including the value of any USDA entitlement and bonus donated foods used to prepare the meal. If cost data are not available, the minimum adult payment should reflect the price charged to students paying the school's designated full price, plus the current value of Federal cash and donated food assistance (entitlement and bonus) for full price meals. In nonpricing programs, the adult charge should be at least the amount of reimbursement received for a free lunch under Sections 4 and 11 of the National School Lunch Act, plus the per-meal value of both USDA entitlement and bonus donated foods or, for breakfasts, the rate established for free meals under Section 4 of the Child Nutrition Act, plus the value of bonus commodities."

Changes in Prices Charged for Meals—While contract language that ensures that the SFA retains control over pricing is required, language that provides the SFA some formal means of changing prices is recommended.

Special Functions—When reviewing cost-type contracts, particular attention should be given to the scope and pricing of special functions, which are conducted outside of the nonprofit school food service. Contract language should include a provision that prohibits the use of USDA donated foods or processed end products containing USDA donated foods for such functions. Separate billings for special functions are preferable to ensure that school food service costs and special function costs are not intermixed, thus preventing double billing.

Vending Machines—Contracts should include a provision which sets forth the SFA's position on vending machines, if applicable. This provision may include the SFA's position on the ownership of the machines, responsibility for maintenance, control of the revenues they generate, etc.

Adjustments to Payments—The fee structure prescribed in a contract may require adjustment if actual experience does not conform to the assumptions upon which the original fee structure was based. Such cases may include unanticipated drops in enrollment or lowering of Federal reimbursement rates. Contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms. Fee adjustments may not, however, be permitted unless provided for in the IFB or RFP and incorporated into the solicitation/contract thereby not creating a material change.

Any methods and basis for fee adjustment upon renewal must be addressed in the original contract. SFAs should consider limiting fee increases in some way, e.g., to no more than the percentage of change in the Consumer Price Index for All Urban Consumers.

Contracts that allow a FSMC to renegotiate its flat fee rate when a "guaranteed volume" has not been achieved are discouraged because this may inhibit open and free competition. FSMCs may provide an artificially low bid if it were thought that a guaranteed volume could not be achieved. Actual participation is dictated by the quality of the meal service over which the FSMC would have direct control.

Meal Program Cost Controls—Cost and reporting controls must exist. Specifying the types of reports required of the FSMC provides a SFA with one important means of monitoring performance.

Program Cost Accounting and Reporting—As appropriate, SFAs should require periodic reports on operations and state whether the contract is to include monthly profit and loss statements or operating cost reports, daily meal counts, and end of year financial statements.

Control of Food Service Equipment Purchases—Food service equipment is a major capital investment for SFAs. The addition or replacement of equipment by the FSMC without prior approval from the SFA presents a risk to the SFA. Contracts should provide the SFA with final, <u>prior</u> approval authority for the purchase of equipment that is used in storage, preparation and delivery of school meals. Contracts should establish an amortization schedule, if appropriate. Whether or not an amortization schedule is used, title to the property must be vested with the SFA when the equipment is placed in service.

Clauses that require the full repayment of unamortized costs incurred by the FSMC when the contract is terminated or not renewed are not permitted. The contract should state that the SFA can retain the property and continue to make payments in accordance with the amortization schedule or return the property to the FSMC in full release of the unpaid balance. Payment of interest on borrowing, however represented, is an unallowable cost under OMB Circular No. A-87, Cost Principles for State and Local Governments.

Performance Security—A performance security, or bond, is a method available to a SFA to obtain financial recourse in the event that the FSMC fails to perform in a satisfactory manner or defaults on its duties and responsibilities. The performance security would be specified as a flat amount or as a percent of the estimated value of service.

A performance security or bond must be from a surety company listed in the most recent U.S. Department of Treasury Circular 570. SFAs, however, are reminded that OMB Circular No. A-102 considers <u>unnecessary</u> experience and bonding requirements to be restrictive of competition. For example, a $10 million bond would be unnecessary for a $1 million contract.

Operating Cost Guarantees and Recovery:

Guarantees—Contracts for food services may also contain language by which the FSMC guarantees to meet fiscal goals specified by the SFA. Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. "Returns" cannot be contingent upon multi-year contract duration.

Loss Recovery—Contracts are the appropriate place to address liability for losses. Contracts usually address FSMC liability in one of two ways: the FSMC may either be required to reimburse the SFA for the loss without limit or it may reimburse the SFA with limits equal to the management fee or a specified ceiling. Contracts should also address the length of time the SFA can seek recovery of losses. SFAs should seek recovery of any losses for a period of time corresponding to the SFA's period of liability.

Recovery of Overclaims—SFAs are encouraged to add a provision in the contract that requires the FSMC to pay the SFA for any overclaims assessed by the SA due to FSMC 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 SA-established record retention timeframe, whichever is greater. (Refer to the paragraph concerning "Nonperformance" in this chapter.)

Negligence—It is also suggested that any waiver of liability by the SFA for damages by the FSMC to equipment or facilities contain an exclusion to this waiver for any damages caused by negligence.

Other Provisions

Reporting and Recordkeeping Requirements—Contract language should ensure that FSMCs maintain appropriate business records, as applicable, e.g., food and supply bid specifications, purchase orders, invoices, and personnel records that relate to the provision of food services to a SFA. SFAs must adhere to the recordkeeping requirements found at *7 CFR Part 210.15.*

The SFA may want to require reports of program income by school and expenditures, meals served to adults, value of a la carte sales, value of USDA donated foods including processed USDA donated foods, and amount of milk served.

It is recommended that all FSMC records pertaining to the SFA be maintained at the SFA while the contract is in effect, and copies of those records be delivered to the SFA at the conclusion of the contract.

SFAs/FSMCs may retain necessary records in their original form or on microfilm. Contracts should stipulate whether original or microfilm records are required and that records are:

- Maintained in such a way that they are easily accessible;
- Available upon demand; and
- Available at the SFA premises rather than at an FSMC location.

Facilities Management—Contracts should clearly define the responsibilities for food service facilities and operations, such as providing the meal preparation and service facilities, repair and maintenance of equipment, cleaning of the dining areas, trash removal, exterminator services, and repairs.

Hiring and Personnel Practices—Contracts for food services generally contain language about personnel management including hiring practices, management of staff and employee benefits. This should include the following:

SFA and FSMC Staff—Contract language should enable the SFA to have final approval authority for the FSMC's school lunch manager. The SFA may want to consider including educational requirements and experience requirements for the school lunch manager position.

Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Such practices would be of concern if the SFA sought to hire a member of the FSMC staff rather than renewing the contract.

Cross-hiring provisions by either the SFA or the FSMC should be reviewed by the SFA's legal counsel to ensure compliance with Federal and State labor laws.

Personnel Management—Contracts should define responsibility for personnel management in some fashion. In general, FSMCs are responsible for personnel management, even when the staff they are managing are employees of the SFA. Management activities may include employee and labor relations, personnel development, and hiring and termination of management staff. Contracts should also specify responsibility for non-management staff hiring and firing.

Employee Benefits—Contracts should define responsibility for employee benefits and refer to the responsibilities placed upon the FSMC with respect to its own employees. The benefits identified in contracts may include medical benefits, insurance, retirement and holiday pay.

Insurance Requirements—To protect the interests of the SFA, contracts for food services should also contain language about insurance requirements for the FSMCs. Contracts generally identify three liabilities, i.e., comprehensive general liability, workman's compensation, and vehicle insurance. SFAs, however, are reminded that the cost of unnecessary insurance is unallowable under the Federal cost principles.

Nonperformance—SFAs should add a provision in the contract language that requires the FSMC to pay the SFA any overclaims due to FSMC negligence or noncompliance with regulations, including those overclaims based on review or audit findings.

It is recommended that the time limit established in the contract for this provision correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the SA-established record retention timeframe, whichever is greater.

Contract Duration—The beginning date should not be prior to the date the contract is signed.

The basis for renewing the contract, including price increase or decrease provisions, if any, should be stated in the contract and IFB/RFP, as appropriate. Price increase/decrease provisions should be based on a measurable index such as the Consumer Price Index for All Urban Consumers.

Termination Clause—SFAs may also want to include a termination for convenience clause that provides adequate advance notice that would permit the SFA sufficient time to arrange alternate food service if the FSMC exercises the clause.

Certifications—SFAs must obtain satisfaction that a FSMC is neither excluded nor disqualified before doing business with the FSMC. The uniform Federal suspension/debarment certification has been abolished and the collection of paper certifications is no longer mandatory. New rules provide greater flexibility in meeting requirements. An SFA may meet the requirements by <u>any one</u> of three methods in 7 CFR Section 3017.300. They are:

1) Checking the Excluded Parties List System. This is available on the internet at http://epls.arnet.gov

2) Collecting a certification that the FSMC is neither excluded or disqualified. Since a Federal certification form is no longer available, a SFA electing this method must devise its own.

3) Including a clause to this effect in the solicitation/contract.

For all contracts in excess of $100,000, set by U.S.C. 403(11):

In accordance with the provisions of 7 CFR Part 3018, FSMCs who bid for an award exceeding $100,000 must submit a certification regarding lobbying which conforms in substance with the language provided in 7 CFR Part 3018.

In accordance with the provisions of 7 CFR Part 3018, FSMCs who bid for an award exceeding $100,000 must disclose lobbying activities in connection with school nutrition programs. SFAs should contact their SA for further information regarding disclosure of lobbying activities.

While not required, SFAs are encouraged to include provisions for:

- Civil Rights Compliance—Compliance with the following, as amended: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; 7 CFR Parts 15, 15a and 15b; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement in the School Nutrition Programs. While it is the SFA's responsibility to ensure compliance with the civil rights requirements, this provision is intended to ensure that the food service operation conducted by the FSMC does not compromise SFA compliance with these requirements.

- Specifications—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 of a quality that would normally be specified by the SFA is to be used. This provision should be contained in both the IFB/RFP and the contract.

- Certification of Independent Price Determination (also known as "non-collusion statement")—While not required by program regulations, it is strongly suggested that SFAs and FSMCs certify that the prices in the offer have been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition.

Chapter 4:

Advertising

Solicit Bids

The SFA must solicit bids/proposals in accordance with Federal, State, and local procurement procedures. To comply with Federal standards, State and local procedures must provide a sufficient amount of time, prior to the date for opening of bids/proposals, to allow for the preparation and submission of bids/proposals.

If, after solicitation of a number of sources, competition is determined inadequate, a contract may be awarded by noncompetitive negotiation. Since noncompetitive negotiation is limited to specific situations, it should not be used unless expressly approved by the SA. In such instances, the SFA must maintain documentation of its efforts to solicit bids.

Time Allowed

Unless otherwise specified by State or local procurement standards, it is suggested that at least 45 days for IFBs and 60 days for RFPs be allowed from the time bids/proposals are solicited to the time that they are due. (It should be noted here that substantially more time overall must be allotted for a procurement under a RFP to allow for such things as proposal evaluation, negotiation with offerors, contract development, etc.) Provided that the IFB/RFP has been properly prepared, an adequate amount of solicitation time works to the advantage of both the SFA and the offeror and contributes to an effective and efficient procurement process.

Advertising Methods

Under either the IFB or RFP procurement method, bids/proposals must be solicited directly from an adequate number of qualified FSMCs and the IFB/RFP must be appropriately publicized in order to provide for maximum open and free competition. To accomplish this, the bids/proposals should at the very least be published in a regional news source. In addition, copies of the complete IFB/RFP should be mailed to prospective offerors, i.e., those FSMCs that are believed to be qualified and that might reasonably be expected to respond to the solicitation. This may include FSMCs that are currently doing business with other SFAs in the State, in adjoining States, or elsewhere. SA guidance should be requested and SA requirements in this matter must be followed including any FSMC registration requirements. Any amendments or changes to the IFB/RFP as well as any questions and answers resulting from written offeror inquiries or from a pre-bid/pre-proposal meeting must be submitted to all prospective offerors. No information regarding the IFB/RFP should be considered official or binding on the SFA until and unless it is provided in writing.

Publicizing of the IFB/RFP should be accomplished in accordance with Federal/State/local procurement procedures. Generally this would be done by advertising in major newspapers/trade journals that are normally used by the SFA for publicizing other procurements. It is not necessary that the entire IFB/RFP be published. At a minimum, however, the advertisement should include the IFB/RFP number and date, a brief description of what is being proposed for procurement, and instructions for obtaining a copy of the IFB/RFP.

Pre-bid/ Pre-proposal Meeting

A SFA may be required to conduct a pre-bid/pre-proposal meeting under State/local procurement procedures or may simply wish to do so, particularly if this is the first procurement of FSMC services by the SFA. It is recommended that such a meeting be conducted and that it be held approximately two weeks after the IFB/RFP is issued but prior to the date bids/offers are due. There are two important reasons for holding a pre-bid/pre-proposal meeting:

Provide Information—to provide information concerning contract performance requirements that may be helpful in the preparation of bids/proposals.

Answer Questions—to answer any questions prospective offerors may have regarding the solicitation.

Furthermore, the meeting may bring to light ambiguities, errors, or omissions in the IFB/RFP, that may later be corrected through written amendments to the IFB/RFP. (The meeting should not be held, however, as a substitute for formally amending a deficient or ambiguous specification or to disseminate performance requirements in addition to those contained in the solicitation.)

The following are some items to consider in planning and conducting a pre-bid/pre-proposal meeting:

Information Regarding Meeting—information regarding the meeting should be a part of the IFB/RFP solicitation package. It need not be publicly advertised but it must be provided to each FSMC that has received a copy of the IFB/RFP either directly or upon request. The information should include a request that questions be submitted several days prior to the meeting to enable the SFA to do research and prepare to respond at the meeting.

Recommended Attendance of Offerors—attendance at the meeting by prospective offerors is strongly recommended but generally should not be required for submittal of a bid/proposal.

Recommended Attendance of SA—in accordance with SA procedures and particularly for first–time FSMC procurements, the SA should be invited to attend the meeting and should receive a copy of all information relevant to the meeting.

Information Provided in Writing—information provided by the SFA at the meeting should not be considered official until provided in writing to all FSMCs that have received the IFB/RFP. Following the meeting, the SFA should prepare a set of questions and answers that were covered at the meeting and should mail this information simultaneously to all prospective offerors.

Chapter 5:

Invitation for Bid/Request for Proposal Openings and Evaluations

It is imperative that Invitation for Bid (IFB) and Request for Proposal (RFP) openings and evaluations are conducted fairly. Inconsistent actions by the individuals responsible for this component of the FSMC procurement can result in bid protests or legal action.

IFB Openings and Evaluations

Competitive sealed bids must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids.

Under the sealed bidding method, when bids are received each one must be time-stamped and dated upon receipt. If received in advance of the bid opening, the bids are then deposited in a secure box, safe, or file until the designated opening time. Unsealed bids or bids received after the designated time and date of bid opening are not accepted.

In the case of IFBs, the sealed bid opening will occur at the time and place stated in the IFB. Each bid is opened publicly and recorded in the presence of interested parties. It is recommended that the SA be invited to attend the bid opening.

If the IFB required a separate presentation of a bid bond, cover sheet or attachment for the bidders to use to demonstrate compliance with the IFB responsiveness criteria, these documents may be pre-screened. If the documents are not pre-screened, they should be checked once the bids are opened to ensure the bidders have met the responsiveness criteria. All bids that fail to meet the responsiveness criteria must be rejected.

The purpose of a bid opening is to ensure that bid prices/responses are not altered after being opened. Once the bids are opened, the name of each bidder and bid price must be recorded. Some common examples of other information read aloud for each bid is: products offered, payment terms, FOB point, delivery date, etc. The contract must be awarded to the responsible FSMC whose bid, conforming to all the material terms and conditions, is the lowest price unless there are sound documented business reasons to reject a bid in the best interest of the program.

Since SFAs must often receive approval of all contracts by their school board, the SFA may refrain from making a formal award until they receive board approval. The successful bidder should be notified of the SFA's intent to recommend acceptance of the bid, but the bidder must be clearly informed of the need for board approval. Once board approval is obtained, a written notice of the award should be made to the successful bidder. Usually, this written notice accompanies a copy of the signed contract. The SFA should contact their legal counsel to identify their responsibilities regarding notification of unsuccessful bidders. At a minimum, unsuccessful bidders should be notified promptly. A copy of the signed contract should also be sent to the SA.

RFP Evaluations

In the case of competitive proposals, a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal.

RFPs should be thoroughly reviewed and subjected to an impartial evaluation. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method. An evaluation plan should be prepared prior to the receipt of any proposals. Among the items that would be included in that plan are:

- Information on Evaluation Team—the size of the evaluation team, the expertise needed on the evaluation team, and the names of the team members.

- Scoring System—the scoring system that will be used to evaluate the proposals. This would include the standards to be applied, the relative ranking and weight of each standard, and how the score will be calculated i.e., the sum of the individual team scores or an average of the total team score.

- Ancillary Materials—development of scoring sheets, composite scoring forms, and any other forms or letters that may be needed. The scoring sheets should contain the evaluation criteria, standards to be applied, scoring columns and room for comments.

The individuals who will be evaluating the proposals should have sufficient knowledge of the goals of the SFA, experience in school food service, financial management experience (of food service, if possible), and experience in evaluating proposals. It is recommended that the SFA invite the SA to attend the evaluation of the proposals.

Proposals should not be opened or reviewed until after the due date established in the RFP. The person responsible for receiving the proposals must safeguard them in order to prevent unauthorized disclosures. It is recommended that all solicitations remain open for a minimum of 60 days to allow vendors sufficient time to respond and to promote fair and open competition.

On the date established for opening and evaluating the proposals, each member of the evaluation team should score each proposal independently. If the RFP allows alternative proposals, care must be taken to ensure the offeror's alternatives address the basic guidelines established in the RFP. Proposals should not be compared to one another. Proposals that fail to address all requirements are unresponsive and cannot receive further consideration. Therefore, the team members should be instructed to use a pass-or-fail basis for eliminating unresponsive proposals, and then use the pre-established scoring system for evaluating the responsive proposals.

If oral presentations are a component of the RFP, great care must be taken to ensure the presentation is scored only for its content. Presentations must be ranked against measurable standards. The team members should be instructed to evaluate the substance of the presentation. Offerors must not be allowed to alter or amend their proposals through the presentation process.

Proposals must be evaluated using the weighted criteria stated in the RFP. A determination must be made by the SFA as to whether the bidder or offeror is responsive to the requirements of the solicitation and whether or not they are responsible and capable of furnishing the goods and services solicited. Contractor integrity, compliance with public policy, record of past performance and financial and technical resources are valid factors in determining contractor responsibility.

Negotiations are conducted with offerors whose proposals receive evaluation scores that exceed a numerical value (i.e., cut-off score) established in advance by the evaluation panel. This "cut-off" score is determined prior to opening any of the proposals. After the evaluations have been completed and all proposals are ranked, those proposals that meet or exceed the pre-established cut-off score are forwarded to the individual or team responsible for negotiating with the offerors. As with IFB bid openings, the name of each offeror and the evaluation score must be recorded. Offerors not selected for further negotiation should be notified in writing.

Contract negotiations must be conducted in a fair and equitable manner. As with all aspects of procurement, the negotiators must be well prepared. The individual(s) evaluating the proposals should not be the same individuals who conduct negotiations with offerors whose proposals receive scores above the prescribed cut-off. The negotiators should inform all offerors of the terms and conditions of the negotiation, including which elements will not be negotiable and which elements can be negotiated. If at all possible, the negotiators should be experienced in school food service operations, school finance and contract negotiations.

It is expected that the negotiation process will result in the selection of the successful offeror. However, if after negotiations, two or more offerors are still under consideration, the SFA must make a final selection using an unbiased method, e.g., the bidders are asked to submit a best and final price. The offerors should be informed of the situation and the method the SFA will use to select the successful offeror. The award should be made to the responsible offeror whose proposal is most advantageous to the SFA, price and other factors considered.

The SFA should provide written notification to the successful offeror which clearly states that while the offeror has been successful, the proposed contract is subject to review by the SA. This notice should also inform the successful offeror that if non-substantive changes are needed as a result of the SA review, an opportunity will be provided to amend the proposal.

When the SFA requests noncompetitive negotiation mandatory FNS pre-award reviews should be in effect. Mandatory FNS pre-award review should also be in place when the SFA submits a request to limit the area of competition for good cause, or the procurement is deemed sole source.

If board approval of the contract is required, this requirement should also be included in the letter to the successful offeror. Unsuccessful offerors should be notified promptly.

The two other methods of procurement, Small Purchase and Noncompetitive Negotiation, are limited to specific situations and should not be used unless expressly approved by the SA.

Analysis of Price

The contract documents should clearly indicate factors to be considered in determining the price. Whether an IFB or RFP, the following factors must be considered:

Prompt Payment Discounts—a prompt payment discount is an applicable credit to the nonprofit food service account only if the SFA earns the reduction by paying the bill or by providing advance funds to another party to pay the bill on its behalf. In the majority of school food authority cost reimbursable contracts, distributors and food service management companies obtain goods from suppliers, are billed by those suppliers, pay the suppliers and then deliver the goods at some later point in time to the school food authority. In these arrangements, the prompt payment discounts are not applicable credits to the school food authority.

Volume Discounts/Financial Incentives—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 [210.21(f)(1)(i)].

Other Benefits—goods, services, or other benefits that do not accrue to the nonprofit school food service account cannot be used to determine the price submitted.

Total Cost—the total cost of the bid/proposal for the breakfast, lunch, a la carte meal service and any other child nutrition program meal service such as the Summer Food Service Program or the Child and Adult Care Food Program that is operated by the SFA and included in the bid/proposal request, must be used in determining the lowest offeror.

21-Day Cycle Menu—if the SFA determines, and the SA agrees, that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation up front. The solicitation should identify the criteria that the SFA will use to evaluate the FSMC's menu, such as affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

Please note that the FSMC-developed cycle menus are only appropriate to use under the competitive negotiation method of procurement, since under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract an FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

Chapter 6:

SA Review

Timing

Under 7 CFR 210.19(a)(6), the SA must review each contract (including all supporting documentation) between an SFA and FSMC prior to execution of the contract to ensure compliance with all the provisions and standards set forth in this part and also in Part 250, Subpart D. The SA is advised to consult with the State distributing agency if different from the SA with respect to contract requirements relating to donated foods.

Contract Checklist

A checklist should be completed by the SFA and submitted with documents to be reviewed by the SA. In the case of renewals, the SFA may want to submit with the renewal documents a copy of the checklist submitted with the initial contract, with notations where changes have occurred and an indication of the basis for the renewal.

Response to SA Comments

For sealed bid procurement, the SA's comments on the prototype contract can be easily accommodated. In the case of negotiated contracts, the situation may be more complex. If the SA reviewed the non–negotiable provisions of the contract prior to release of the RFP, the SA's comments can be incorporated prior to issuing the RFP. After negotiations are completed, the negotiated provisions of the proposed contract should be reviewed by the SA. These provisions may require revision before the contract is final. This can create situations where the offeror withdraws or modifies a final offer. In these cases, the SFA may need to reopen negotiations. In cases where the SA did not review the non–negotiable provisions of the contract, the entire contract should be reviewed and could be open for revision.

In either case, any revisions required by the SA in a negotiated contract must be accepted by the successful offeror before the contract can be finalized. If the revisions significantly alter the scope of work under the contract, re-negotiations may be necessary. After the SA reviews the negotiated contract and any revisions have been made, the contract can be signed by the SFA and the FSMC. For both sealed bid and negotiated contracts, a copy of the signed contract must be submitted to the SA.

For more information on SA review, see the FSMC Guidance for SAs.

Chapter 7:

SFA Monitoring/Recordkeeping Responsibilities

Monitoring

The SFA must monitor the operation of the FSMC through periodic on-site visits in order to ensure that the FSMC complies with the contract and any other applicable Federal, State, and local rules and regulations.

The SFA should maintain documentation of its monitoring and whether or not corrective action was taken. The SFA's contract monitoring responsibilities include, but are not limited to, evaluating:

Cycle Menu—adherence to the cycle menu and any and all deviations allowed under the contract.

Meal Pattern—adherence to the meal pattern requirements specified in 7 CFR Parts 210 and/or 220.

Claim Documentation—records, by school, to support the Claim for Reimbursement (meal/milk counts and any other data on the claim for which the FSMC is responsible).

Cost Records—cost records, including source documentation supporting charges for contractually approved costs for cost–based contracts, e.g., time and attendance records for staff hours charged.

Meal Count Records—meal count records for meals not covered by the Claim for Reimbursement, e.g., adult meals, etc.

Revenue Records—revenue records broken down by source, type and category of meal or food service, e.g., a la carte sales, reduced price and full price NSLP and SBP meals, vending machine sales, etc.

Outside Activities—outside food service activities.

Preparation Facilities—the FSMC meal preparation facilities.

USDA Donated Foods—that they have conducted a reconciliation at least annually (and upon termination of the contract) to ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's food service in the school year, including, in accordance with requirements in 7 CFR 250.51(a), the value of donated foods contained in processed end products.

Please Note: If the FSMC is in charge of the meal counting and claiming system, refer to the regulations at 210.8(a)(1) which state that every school year an SFA with more than one school must perform at least one on-site review of the lunch counting and claiming system employed by each school under its jurisdiction. Therefore, if the FSMC is in fact in charge of the meal counting and claiming system, the SFA would be monitoring that portion of their services every school year.

Additional Monitoring Responsibilities

The SFA must conduct on-site school reviews and must monitor through these reviews and by other means:

Civil Rights—compliance with civil rights requirements. In addition to monitoring compliance, the SFA must ensure the FSMC complies with the procedures established by the SFA for referring any civil rights complaints to the SFA.

Free and Reduced Price Policy—adherence to the SFA's approved free and reduced price meal policy statement.

Offer versus Serve—compliance with offer versus serve requirements.

Competitive Foods—compliance with the competitive foods requirements of the NSLP regulations in all schools by all parties.

SFA Policies—compliance with all policies established by the SFA.

Recordkeeping Responsibilities

As discussed in Chapter 3, the SFA must maintain any books, documents, papers and records directly pertinent to: the solicitation, award or extension of any given contract and the implementation of that contract. Such records must be maintained for a period of 3 years, as specified in 7 CFR 210.23(c).

Additionally, the SFA must ensure that the contract/solicitation for the FSMC includes a provision outlining the recordkeeping responsibilities.

Chapter 8:

Contract Duration/Renewals

Duration

As stated earlier, the contract duration must be limited to one year, with the effective beginning and ending dates stated in the contract. The beginning date should not be prior to the date the contract is signed. Additionally, if renewals will be permitted, the contract must also state the date by which the renewal must be executed by both the SFA and FSMC.

Although a maximum of four one–year renewals are permitted, contracts cannot contain automatic renewal provisions. The renewal date must occur on or prior to the expiration date of the current contract. Any provisions, including adjustments to payments, that will be used for renewing contracts must be stated in the contract and the IFB or RFP, as applicable. These alterations cannot result in substantive changes to the original contract. If the SFA determines that significant changes that are material in nature are necessary, then the SFA must rebid the contract.

Please note that contracts (including all supporting documentation) between any SFA and FSMC must be reviewed annually by the State Agency <u>prior to execution of the contract by either party</u> to ensure compliance with all the provisions and standards set forth in this part. SFAs must include the following provision, or language that is tantamount to this provision, in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: 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.

Renewals

While contract renewals are permitted, a SFA is not required to renew the contract for an additional year and should do so only after careful evaluation of the FSMC's performance and a determination that the renewal will benefit the SFA.

In the case of contract renewals, SFA must ensure that any changes to the contract do not result in a <u>material</u> change the terms and conditions of the original contract. A material change is any change made to a contract after it has been awarded that alters the terms and conditions of that contract substantially enough that had other respondents known of these changes in advance, they could have bid differently and more competitively. This means that when a school food authority agrees to or allows a winning bidder to make changes to contract terms (including the terms of a contract renewal) that are materially inconsistent with the underlying solicitation document, the school food authority has subverted full and open competition by denying all bidders the opportunity to compete under the same terms and conditions. In this situation, the SFA must re-bid the contract.

The SFA's contract with the food service management company must include all of the provisions listed in 7 CFR 250.53, as applicable. In accordance with 7 CFR 250.52(c), when a contract terminates, and is not extended or renewed, the food service management company must return all unused donated ground beef, donated ground pork, and processed end products, and must, at the SFA's discretion, return other unused donated foods. The SFA must also ensure that the food service management company has credited it for the value of all donated foods received for use in the SFA's food service in the school year.

Among the elements that should be used when deciding whether to renew a contract are:

Performance—the overall performance of the FSMC in accordance with the contract provisions, including the FSMC's completion of planned activities as described in the contract. The SFA should document its findings while conducting its monitoring requirements of the FSMC and refer to these documents when making this determination. In addition to reviewing the deficiencies noted in the FSMC's performance, the SFA should review the effectiveness of the FSMC's corrective action plans.

Meal Quality—meal quality, including adherence to menu cycle/food specifications, and complaints.

Costs—the full cost of using a FSMC versus the projected costs under the contract.

Financial Status—the overall financial status of the food service operation and the food service account.

Unexpected Costs—any unexpected costs incurred as a result of using a FSMC, and any unexpected cost reductions that have resulted from using a FSMC. The SFA should ascertain these costs based on information received from the FSMC and other sources.

Participation—participation trends including NSLP/SBP participation compared to a la carte sales.

Advisory Board—the comments and recommendations of the advisory board and the FSMC's responsiveness to these recommendations.

Adjustments to Payments—any increase in the prices requested by the FSMC or any change in the basis upon which the FSMC is paid.

Crediting for the Value of USDA Donated Foods—assurance of crediting for the value of all donated foods received for use in the SFA's meal service in the school year, in accordance with 7 CFR 250.51(a) and (b).

Corrective Actions—recommendations from local, State, and Federal reviews and audits, including the status of required corrective actions.

Glossary of Terms

For the purposes of this guidance, the term:

Bidder means the entity that responds to an Invitation for Bid for the purpose of providing a product or service.

Buy American means the "Buy American" provision (in section 12(n) of the National School Lunch Act) requires schools to purchase, to the maximum extent practicable, domestic commodities and products. A domestic commodity or product means an agricultural commodity that is processed in the United States, and a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States. Purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for free and open competition. Any entity that purchases food or food products on behalf of the SFA must follow the same "Buy American" provisions that the SFA is required to follow.

Code of Federal Regulations (CFR) means the codification of the general and permanent rules published in the *Federal Register* by the Executive departments and agencies of the Federal government.

Competitive Proposals (previously known as Competitive Negotiation), i.e. a request for proposal, means a method of procurement whereby a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method.

Competitive Sealed Bids, i.e. and invitation for bid, means a formal method of procurement in which sealed bids are publicly solicited, i.e. through and invitation for bid, resulting in the award of a firm-fixed price contract to the responsible bidder whose bid is responsive to the IFB, conforms with all the material terms and conditions of the invitation for bids, and is lowest in price. In this case, the IFB must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids.

Contract means a formal, legally enforceable agreement between a buyer (client) and a seller (contractor) that establishes a legally binding obligation for the seller to furnish goods and/or services and for the buyer to compensate the seller. A contract must clearly and accurately describe the goods and/or services to be delivered or performed and the terms and conditions of the agreement. In the case of school meals programs, a contract is executed by the authorized representatives of the SFA and the contractor that calls for the provision of services, materials, supplies or equipment by the contractor in accordance with all conditions and specifications in the bid/proposal documents, for a price to be paid by the SFA prior to execution.

Contract Documents means the bid specifications, requirements, the IFB or the RFP, and the contract, as applicable.

Cost Reimbursable Contract means a formal, legally enforceable contract that reimburses the contractor for costs incurred under the contract, but does not provide for any other payment to the contractor, with or without a fixed fee. In a cost reimbursable contract, 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.

Donated Foods means foods donated, or available for donation, by the United States Department of Agriculture.

Equipment means tangible, non-expendable, personal property that has a useful life of more than one year and an acquisition cost of $5,000 or more. State law or policy may set stricter capitalization thresholds for equipment than the one set by Federal standards. Any SFA may use its own definition of equipment if its definition would at least include all items of equipment as defined here.

Execution of Contracts means to complete and formally sign the legal document. For school meals purposes, it is the official signing of the contract by the School Food Authority and the contractor, which indicates that the contract has begun (or has been renewed). Before any contract or amendment to an existing food service management company contract is executed, a State agency must review and approve the contract terms and assure that the SFA has incorporated all State agency required changes into the contract or amendment.

FNS means the Food and Nutrition Service of the United States Department of Agriculture. FNS administers the nutrition assistance programs of USDA. The mission of FNS is to provide children and needy families with better access to food and a more healthful diet through its food assistance programs and comprehensive nutrition education efforts.

Fixed-price means a price that is fixed at the inception of a contract and is guaranteed for a specific period of time.

Food Service Management Company (FSMC) means a commercial enterprise or a nonprofit organization that is or may be contracted with by the SFA to manage any aspect of the school food service. An FSMC is a company that is acting on behalf of a school food authority by actually being in charge of or directing any aspect of the food service, and must meet applicable program requirements.

Grantees and Subgrantees means the government or other legal entity to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document. A subgrantee is the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Invitation for Bid (IFB) means a type of solicitation document used in competitive sealed bidding, where the primary consideration is cost and the expectation is that competitive bids will be received and an acceptance (award) will be made to the responsive and responsible bidder whose bid is lowest in price. An IFB is a formal method of procurement that uses sealed bidding and results in a fixed price contract with or without adjustment factors. The IFB must be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids. Also, the IFB should describe the minimum standards expected of a responsible bidder in measurable terms.

Noncompetitive Negotiation means a procurement method used when competition is deemed inadequate. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;
(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
(C) The awarding agency authorizes noncompetitive proposals; or
(D) After solicitation of a number of sources, competition is determined inadequate. Negotiations must include both price and terms using the same procedures that would be followed for competitive proposals.

Nonprofit School Food Service means the restricted account in which all of the revenue from the food service operations conducted by the school food authority principally for the benefit of school children is retained. This account is used only for the operation or improvement of the nonprofit school food service. Any money earned from the operation of the food service can be used only to operate or improve the food service.

Offeror means the entity that responds to a Request for proposal for the purpose of providing a product or service.

OMB Circular No. A-102, Attachment O means the Federal standards governing procurements made by SAs, SFAs and other local program operators under Federal open-ended entitlement programs. Such programs include the National School Lunch Program, the School Breakfast Program and the Special Milk Program for Children; accordingly, these standards apply to SFAs operating these programs.

Processor means any commercial facility which processes or repackages donated foods. However, commercial enterprises which handle, prepare and/or serve products or meals containing donated foods on-site solely for the individual recipient agency under contract are exempt under this definition. For further information see the definition in 7 CFR 250.3.

Procurement means the process of obtaining goods and/or services in accordance with applicable rules and regulations.

Request for Proposal (RFP) means a type of solicitation document used for the formal procurement method of competitive proposals. The RFP identifies the goods and services needed and all significant evaluation factors. The RFP is publicized and is used to solicit proposals from a number of sources. Negotiations are conducted with more than one of the sources submitting proposals, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive proposals may be used if conditions are not appropriate for the use of competitive sealed bids.

Respondent means the entity that responds to either an IFB or RFP for the purpose of providing a product or service.

Responsible Bidder/Offeror means a bidder/offeror who is capable of performing successfully under the terms and conditions of the contract.

Responsive Bidder/Offeror means a bidder/offeror whose bid/offer conforms with all the material terms and conditions of the solicitation.

School Food Authorities (SFAs) means the governing body which is responsible for the administration of one or more schools, and has legal authority to operate the National School Lunch Program or School Breakfast Program therin *or* be otherwise approved by FNS to operate the Program. The school system superintendent is typically the person authorized by the governing body to sign legal documents for the SFA.

Small Purchase Procedures are those relatively simple and informal procurement methods for securing services, supplies, or property that may be used when the anticipated acquisition will fall below the acquisition threshold. The Federal threshold for small purchase procedures is fixed at 41 U.S.C. 403(11) currently set at $100,000. However, State and local regulations often set lower small purchase thresholds which are more restrictive than the Federal level. In applying the small purchase threshold, the SFA must adhere to the most restrictive, lowest limit set. If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

Sole Source Procurement in the Child Nutrition Programs occur only when the goods or services are available from only one manufacturer through only one distributor or supplier. Sole source describes a condition of the procurement environment. In a true sole source situation, conducting a traditional solicitation (sealed bid, competitive negotiation or small purchase) is a meaningless act, because the element of competition will not exist. When faced with an actual sole source situation, an SFA must first obtain State agency approval, and then go directly to the one source of supply to negotiate terms, conditions and prices.

Solicitation means a document used by the SFA to acquire goods and/or services. Solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Solicitations must also identify all the requirements which the offerors must fulfill and all other factors to be used in evaluating the bids or proposals.

Vendor means a merchandiser of complete meals, meal components, or raw materials.