



Food and
Nutrition
Service

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Center

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SUBJECT: Local Agency Procurement Reviews: School Year 2015-2016

TO: Regional Directors
Special Nutrition Programs
All Regions

State Directors
All States

Program integrity is essential in all aspects of Program administration and State agencies contribute to this by overseeing Program operations. To this end, this memorandum provides guidance on State agency oversight of Program operator procurement procedures while FNS is currently developing a Local Agency Procurement Review Tool to aid State agencies. This tool will be pilot tested to determine effectiveness in SY2015-2016. To assist State agency staff with oversight while the tool is under development, the FNS developed a list of questions that may guide the State's assessment of Program operator procurement activities. (See attached.)

As has always been the case, State agencies must ensure compliance with procurement requirements in Program regulations (7 CFR Parts 210.21, 215.14a, 220.16, 225.17, and 226.22, as applicable), and the government-wide regulations in 7 CFR Part 3016 and 3019, as applicable. In SY2014-2015, programs operated using 7 CFR Parts 3016 and 3019 as Federal/State agreements were already in place and 2 CFR Part 200 was not finalized. Compliance, therefore, should be assessed by reviewing documentation of the procurement procedures using the regulations in effect at that time. State agencies must distribute this memorandum to Program operators. Program operators with questions should contact their State agency. State agencies with questions may contact the appropriate FNS Regional Office.

Sincerely,

Sarah Smith-Holmes
Division Director
Program Monitoring and Operational Support

Attachment

Attachment

Questions State agencies may use to guide Local Agency Procurement Reviews in SY2015-2016

The questions below may be used in assessing Program operators' full and open competition in compliance with Program regulations and government-wide regulations located in 7 CFR Parts 3016 and 3019, as applicable.

- 1. Is the Program operator complying with Federal and State procurement standards that include the general standards in 7 CFR Parts 3016 and 3019, as applicable?**
 - a. Compliant code of conduct; and
 - b. Written procurement procedures.

- 2. Is the Program operator using the procurement methods in 7 CFR Parts 3016 and 3019, as applicable, and identified below?** (The micro-purchase procurement method was not available in SY2014-2015.)
 - a. Informal procurement method: for purchases valued *at or below* \$150,000, or a more restrictive state or local threshold:
 - i. Price or rate quotations shall be obtained from an adequate number of qualified sources.
 - b. Formal purchase procedures: valued *above* \$150,000, or more a more restrictive state or local threshold:
 - i. *Sealed bids* (using an Invitation for Bid): bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.
 1. The following conditions should be present:
 - a. A complete, adequate, and realistic specification or purchase description is available;
 - b. Two or more responsible bidders are willing and able to compete effectively and for the business; and
 - c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
 2. The following requirements apply:
 - a. The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;
 - b. The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;
 - c. All bids will be publicly opened at the time and place prescribed in the invitation for bids;

- d. A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
 - e. Any or all bids may be rejected if there is a sound documented reason.
 - ii. *Competitive proposals* (using a Request for Proposal): normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.
 - 1. The following requirements apply:
 - a. Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
 - b. Proposals will be solicited from an adequate number of qualified sources;
 - c. Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees; and
 - d. Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered, but with the lowest cost/price as the primary factor.
- c. Noncompetitive negotiation: determine if any contracts were awarded through solicitation from only one source due to:
 - i. Only a single source is available;
 - ii. Public exigency or emergency;
 - iii. Express authorization from the State agency/FNS in response to a written request from the Program operator; or
 - iv. After solicitation of a number of sources, competition is determined inadequate.

3. Does the Program operator's procurement procedures include:

- a. Bond requirements in 7 CFR Part 3016.36(h) and 7 CFR 3019.48(c), as applicable?
- b. Contract provisions required by 7 CFR Parts 3016.36(i), as applicable?
 - i. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)
 - ii. Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)
 - iii. Notice of awarding agency requirements and regulations pertaining to reporting.
 - iv. Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
 - v. Awarding agency requirements and regulations pertaining to copyrights and rights in data.
 - vi. Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
 - vii. Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.
 - viii. Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)
 - ix. Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).
- c. Contract provisions required by 7 CFR Part 3019.48 and Appendix A to that part, as applicable?
 - i. Same as i, iv, vi, viii, in section b. above.
 - ii. Suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor. (Contracts more than the simplified acquisition threshold)
 - iii. Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,00. For those contracts or subcontracts exceeding \$100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient,

provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected.

- iv. Equal Employment Opportunity—All contracts shall contain a provision requiring compliance with E.O. 11246, “Equal Employment Opportunity.”
- v. Copeland “Anti-Kickback” Act—All contracts and subgrants in excess of \$2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland “Anti-Kickback” Act.
- vi. Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)—Where applicable, all contracts awarded by recipients in excess of \$2500 for contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5).
- vii. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification.
- viii. Debarment and Suspension (E.O.s 12549 and 12689)—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and 12689, “Debarment and Suspension.”

d. Procurement standards of Program regulations, as applicable? These include:

Programs	Buy American	Cost-reimbursable Contract Provisions	Geographic Preference
NSLP and SBP	7 CFR Parts 210.21(d) and 220.16(d)	7 CFR Parts 210.16, 210.21(f), 220.16(e), and 250.53	7 CFR Part 210.21(g) and 220.16(f)
SMP	-	7 CFR Part 215.14a(d)	7 CFR Part 215.14a(e)
SFSP	-	-	7 CFR Part 225.17(e)
CACFP	-	-	7 CFR Part 226.22(n)

4. Does the Program operator clearly identify scope of need, evaluation factors, contract type, contract duration, and other provisions, as needed?

State agencies should assess compliance in this area by reviewing documentation of the procurement process: solicitations, bids/offers, evaluation and award procedures, and contract performance management procedures. State agencies should review procurement methods used to award vendor contracts, i.e., sealed bids, competitive proposals, or noncompetitive proposals, as applicable. Vendor contracts can vary widely: distributors of purchased food and supplies, technology services, equipment maintenance, processors of USDA donated foods, food service management company (FSMC) contracts, etc.

5. Does the Program operator have provisions that address unallowable and/or unallocable costs in their solicitation/contract? This includes:

- a. overly responsive and value-added items;
- b. third party vendor agreements; and
- c. fees that have not been properly procured.

6. Does the Program operator have contract management procedures to ensure contractor compliance?

States agencies should assess how the program operator ensures contracted products and services are received prior to authorizing payment.

7. How should a State agency monitor school food authorities (SFAs) contracting with group purchasing organizations or group buying organizations?

State agencies are reminded that when Program operators conduct procurement activities cooperatively, the cooperative must comply with procurement regulations in the same way as an individual Program operator. Also, when a third-party organization conducts the solicitation process on behalf of Program operators, a compliant competitive solicitation must be conducted for these services. It is not sufficient to simply become a member of the third party organization by paying a fee (i.e., membership, distribution, or other fee). Further compliance issues are raised when a third-party organization offers to provide services at no cost to the Program operator, while charging a fee to the distributor, without the benefit of a competitive solicitation process that outlines this payment method. The solicitation for these services must include provisions and language that clearly articulates Federal procurement requirements, including Program requirements, as these entities purchase products and services that will be paid using Federal Program funds. This applies to all entities buying products and services on behalf of SFAs, FSMCs, as well as other third-party entities.

8. How is technical assistance and corrective action for repeated violations ensured?

As with review procedures in all Programs, if findings of noncompliance are identified, these must be documented, technical assistance provided, and corrective action required. Corrective action can take various forms, to include:

- a. amending contracts to remove unallowable provisions;
- b. re-soliciting contracts to ensure contracts are awarded to the responsive and responsible bidder/offeror whose price is lowest, or most advantageous, with price and other factors considered and with price as the primary factor as required in 7 CFR Part 3016.36(d)(2-3) and policy guidance *July 2005 Procurement Questions*, dated July 14, 2005.
 - i. New solicitations and contracts must be finalized by SY2016-2017; and
 - ii. State agencies may require a pre-issuance review of proposed procurements per 7 CFR Part 210.21(c)(1).
- c. attending State agency provided procurement training to increase knowledge of procurement standards; and

d. assessing the need for fiscal recovery.

Fiscal recovery and re-solicitation contracts, if needed, will be assessed on a case-by-case basis, with assistance from the appropriate Regional office.