

Procurement

Section 17 , Procurement Update Guide

- April 4, 2017 Updated *Section 17, Procurement* to provide new guidance on the Buy America provision.
- March 13, 2017 Updated *Section 17, Procurement* to remove detailed guidance on consultants, food service management companies (FSMC), and vended meals; this guidance has been moved to *Administrator’s Reference Manual, Section 22, Food Service Contracts*. Incorporated the following United States Department of Agriculture (USDA) memo and guidance:
- *USDA Memo SP 05-2017, Q&A: Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third-Party Services* (October 19, 2016)
- Clarified information on the following topics:
- Additional resources
 - Agent contracts
 - Aggregate
 - Brand name products
 - Buy American
 - Consultant contracts
 - Cooperative purchasing
 - Cost plus percentage of cost pricing structures
 - Equipment technical requirements
 - New terms related to cooperative purchasing: agent, operator, operator-only cooperative, third party cooperative
 - Noncompetitive method
 - Pricing
 - Vendor list
- November 29, 2016 Updated to address typographical errors
- October 26, 2016 Updated *Section 17, Procurement* to provide clarification on the following topic:
- Micro-purchase
- October 21, 2016 Updated *Section 17, Procurement* to incorporate the following United States Department of Agriculture (USDA) memo and guidance:
- *USDA Memo SP 35-2016, Bonding Requirements for Food Service Management Companies and Other Subcontractors* (May 5, 2016)
 - *USDA Memo SP 12-2016, Guidance on Competitive Procurement Standards for Program Operators* (November 13, 2015)
- Clarified information on the following topics:
- Additional purchases (piggybacking)
 - Advertising requirement
 - Applicability of the *Education Department General Administration Regulations (EDGAR)* and other Texas Education Agency regulations
 - Awarding the contract
 - Bonding requirements and bid guarantees

- Buy American Provision
- Code of conduct, ethical standards, and conflict of interest
- Consultant contracts
- Contract management
- Cooperative membership
- Cooperative purchasing
- Credits, rebates, and discounts
- Difference between consultant and food service management contracts
- Full and open competition
- Micro-purchase
- Noncompetitive procurement method, including sole source
- Offers received after the due date
- Opening offers prior to the due date
- Other regulatory contract requirements
- Preparation of solicitation
- Procuring fresh fruit and vegetables
- Protests
- Public advertising
- Purchase catalog
- Responsive offers
- Solicitation, purchase catalog, shared purchasing, taste testing samples
- Total costs
- Vendor list for produce
- Written procurement procedures

February 10, 2016 Updated *Section 17, Procurement* to incorporate the following United States Department of Agriculture (USDA) memos and guidance:

- *USDA Memo SP 24-2016, Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program* (February 3, 2016)

Clarified information on the following topics:

- Buy American Provision

January 5, 2016 Updated *Section 17, Procurement* to incorporate the following United States Department of Agriculture (USDA) memos and guidance:

- *USDA Memo SP 03-2016, Procurement Standards and Resource Management Requirements Related to Franchise Agreements* (November 6, 2015)
- *USDA Memo SP 02-2016, Questions and Answers on the Transition to and Implementation of 2 CFR Part 200* (October 30, 2015)
- *Procuring Local Foods for Child Nutrition Programs* (released by USDA September 8, 2015)
- *Updated Title 2 Code of Federal Regulations (CFR), Part 200—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (August 10, 2015 and September 10, 2015)
- *USDA Memo 30-2015, Office of Management and Budget Super-Circular-2 CFR 200* (March 18, 2015)

- *USDA Memo SP 09-2015, Written Codes of Conduct and Performance of Employees Engaged in Award and Administration of Contracts* (November 21, 2014)
- *USDA Memo SP 23-2013, Guidance Reaffirming the Requirement that State Agencies and School Food Authorities Periodically Review Food Service Management Company Cost Reimbursable Contracts and Contracts Associated with USDA Foods* (February 12, 2013)
- *USDA Memo SP 03-2013, Procurement Geographic Preference Q&A's - Part II*, October 9, 2012)
- *USDA Memo SP 01-2103, Federal Small Purchase Threshold Adjustment* (October 2, 2012)
- *USDA Memo SP 35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc.* (June 12, 2012)
- *USDA Memo SP 19-2012, Soliciting Bids from Commercial Distributors for End Products* (February 24, 2012)
- *USDA Memo SP 17-2012, Procurement Questions and Answers to Assist in the Implementation of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Program* (February 23, 2012)
- *USDA Memo SP 14-2012, Procurement Questions Relevant to the Buy American Provision* (February 13, 2012)

Clarified information on the following topics:

- Additional resources
- Compliance
- Contracts
- Managing contracts
- Records Retention
- Solicitations
- Types of procurement methods
- Written procurement procedures

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Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition

When contacting TDA by phone, Contracting Entities (CEs) need to have their CE Identification Number (CE ID) (and site ID if applicable). CEs should include their name and CE ID (and site name and ID if applicable) in all communication or documentation.

Website: www.squaremeals.org

Phone: 877-TEXMEAL, (877) 839-6385 | **Fax:** (888) 203-6593

Physical Address: 1700 N. Congress, 11th Floor, Austin, TX 78701

Mailing Address: PO Box 12847, Austin, TX 78711-2847

Email Contact for General Information:

squaremeals@TexasAgriculture.gov

Email Contact for Issues Related to Applications:

National School Lunch Program, School Breakfast Program, & Special Milk Program

NSLP-SBP.BOps@TexasAgriculture.gov

Fresh Fruit and Vegetable Program

FFVP.Bops@TexasAgriculture.gov

Seamless Summer Option

SSO.BOps@TexasAgriculture.gov

Child & Adult Care Food Program

CACFP.BOps@TexasAgriculture.gov

Summer Food Service Program

SFSP.BOps@TexasAgriculture.gov

Commodity Operations

CommodityOperations@TexasAgriculture.gov

Email Contact for Issues Related to Program Operation:

Commodity Operations (USDA Foods)

CommodityOperations@TexasAgriculture.gov

Community Operations (Child and Adult Care Food Program and Summer Food Service Program)

Commuinty.Ops@TexasAgriculture.gov

Local Products

LocalProducts.SquareMeals@TexasAgriculture.gov

School Operations (National School Lunch Program and School Breakfast Program)

School.Operations@TexasAgriculture.gov

Procurement

The procurement process is designed to assist contracting entities (CEs) in establishing procedures that ensure full and open competition (also called free and open competition) for the purchase of products and/or services.

Procurement is the act of obtaining of goods or services in exchange for money or value.¹

The guidance in this section applies to the following school nutrition programs (SNPs):

- National School Lunch Program (NSLP)
 - Afterschool Care Program (ASCP)
 - Fresh Fruit and Vegetable Program (FFVP)
 - Seamless Summer Option (SSO)
- School Breakfast Program (SBP)
- Special Milk Program (SMP)

The guidance in this section is intended to assist CEs in developing an effective and compliant procurement process.

Information Box 1

Additional Resources for Procurement

Texas Comptroller of Public Accounts

The website for the Texas Comptroller provides information on state regulations that apply to state and local governmental entities. Available at www.comptroller.texas.gov/

Resources include the following:

- *Model Purchasing Manual for Texas Cities and Counties 2010* which includes information that applies to all governmental entities including schools. Available at www.texasahead.org/lga/finances/purchasing/96-449_Model_Purchasing_Manual_11_10.pdf
- *State of Texas Contract Management Guide* which provides guidance and recommendations on improving existing contract management processes and practices. Available at www.comptroller.texas.gov/purchasing/publications/contract-management-guide.php

Texas Education Agency (TEA)

Financial Accountability System Resource Guide provides detailed guidance of financial accountability, including Module 3, Purchasing, for local education agencies and charter schools. Available at www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial_Accountability_System_Resource_Guide/

United States Office of Management and Budget (OMB)

2 Code of Federal Regulations, Part 200—These regulations provide detailed information on required federal procurement process. Available at www.fns.usda.gov/es/node/73141

¹ Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.

Consultants, Food Service Management Companies, and Vended Meals

The guidance in this section applies to contracts for consultants, food service management companies (FSMCs), and vended meals. However, there is also additional guidance specific to these types of contracts located in *Administrator's Reference Manual, Section 22, Food Service Contracts*.

Implementation of 2 Code of Federal Regulation (CFR) Part 200

The updates to *Section 17, Procurement* include the consolidated 2 Code of Federal Regulation (CFR) Part 200 which replaced existing rules at 7 CFR Parts 3015, 3016, 3019, and 3052, and the following Office of Management and Budget (OMB) guidance documents; 2 CFR Part 220 (A-21), A-50 (sections related to audits), 2 CFR Part 225 (A-87), A-89, A-102, A-110, 2 CFR Part 230 (A-122), and A-133.

2 CFR Part 200 primarily serves to consolidate the previous regulations into one location as a convenience and for clarity. For procurement, 2 CFR Part 200 clarifies existing regulation and adds one new flexibility—micro-purchasing.

[NOTE: 2 CFR Part 200 also applies to all financial and accounting practices. Section 17, Procurement only addresses issues related to procurement. Other finance and accounting issues are addressed in Section 14, Financial Information Concerning School Nutrition Funds.]

Conflicting Program Regulations

For CEs operating Child Nutrition Programs (CNP), there are federal, state, and local regulations that govern the actions of the CE. If other applicable federal, state, or local regulation does not conflict with USDA regulations, the CE must follow the other federal, state, or local regulations in addition to the USDA regulation. All programs that receive federal funds are required to follow 2 CFR Part 200 unless federal legislation supersedes 2 CFR Part 200.

EDGAR

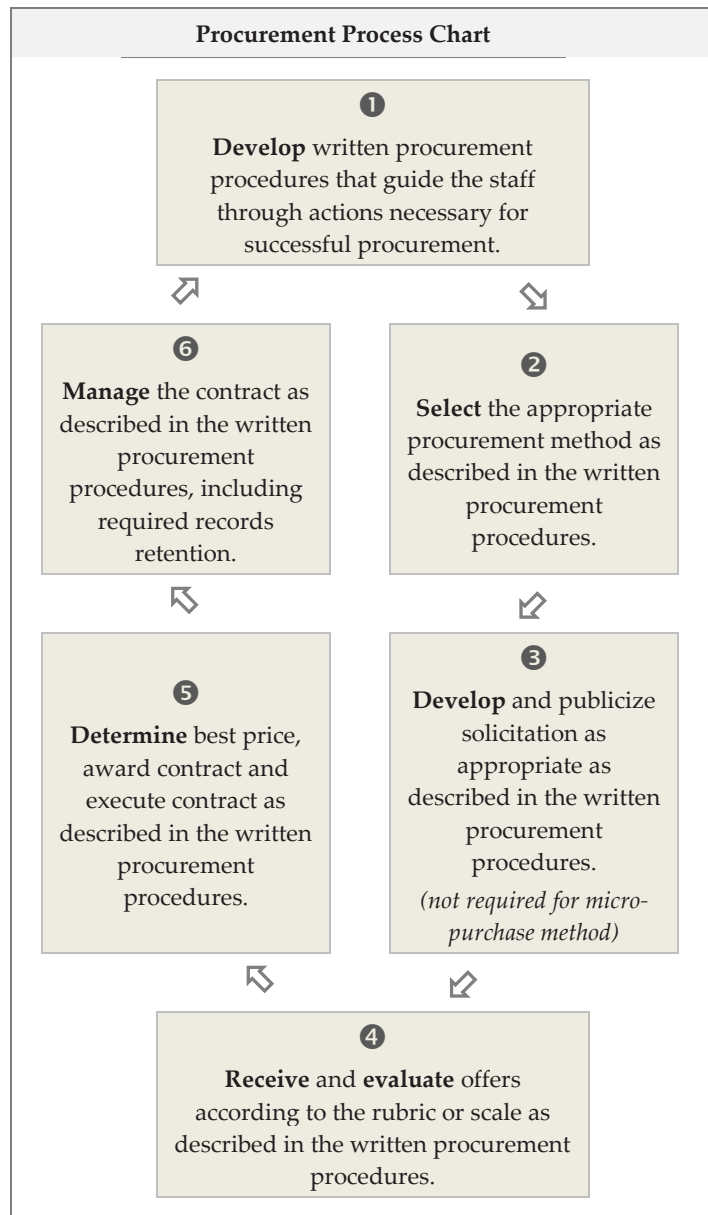
CEs receiving funds through the United States Department of Education are required to follow the regulations described in the *Education Department General Administration Regulations (EDGAR)*. While there are regulations in EDGAR that conflict with USDA regulations, in most situations CEs will find the regulations to be compatible. However, if there is a regulatory conflict, CEs are required to follow the USDA regulations for all CNP funds (income, allowable and unallowable costs, and procurement).

Effective Procurement Systems

The procurement process follows a set of prescribed steps:

1. **Develop** written procurement procedures that guide the staff through actions necessary for successful procurement.
2. **Select** the appropriate procurement method as described in the written procurement procedures (*not required for micro-purchase method*).
1. **Develop** and **publicize** solicitation as appropriate as described in the written procurement procedures.
2. **Receive** and evaluate offers according to the rubric or scale as described in the written procurement procedures.
3. **Determine** best price, award contract and execute contract as described in the written procurement procedures.
4. **Manage** the contract as described in the written procurement procedures, including required records retention.

The *Procurement Process Chart* illustrates the flow of the procurement process.



Program Integrity and Internal Controls

The procurement process is intended to promote program integrity and establish internal controls.

Program Integrity is defined as an organized and structurally sound financial management system that promotes program efficiency and prevents the inappropriate use of program funds.

This type of financial management system provides safeguards that improve the stewardship of federal money and reduce fraud and improper payments by the use of internal controls. In procurement,

Internal controls (1) define actions related to the procurement process, (2) establish standards of ethical conduct, and (3) provide full and open competition.²

Any cost paid to a contractor as a result of improper procurement methods, whether paid by the CE or a third party, is an unallowable expense. Unallowable expenses must not be paid by the school nutrition program.

Other Entities (Third-Party Entities). Any agency, organization, group, business, food service management company, food processor, contractor, distributor, vendor, or other entity acting on behalf³ of the CE for any of the SNP programs are also required to follow the federal procurement guidance described in this section for any procurement actions they take on behalf of the CE.

All third-party entities must provide adequate documentation⁴ to a CE so that the CE can determine if the procurement regulations have been implemented appropriately, including, but not limited to, documentation related to credits, discounts, and rebates as well as USDA Foods values.

² See the *Full and Open Competition* subsection in this section for additional information on this topic.

³ See the *Definitions* subsection in this section for additional information on this topic.

⁴ See the *Records Retention* subsection in this section for additional information on documentation.

Definitions for This Section

For this section, the following definitions will be useful:

[NOTE: The definitions provided in this section are specific to financial transactions that occur for school nutrition programs.]

<i>Acting on Behalf of CE</i>	Entity or person who has been given the responsibility to take action for the CE.
<i>Agent</i>	Person or business that is procured to act on behalf of the CE. This includes procuring on behalf of the CE.
<i>Aggregate Purchase Amount</i>	Total amount of a single invoice for a single purchase of or transaction for product(s) and/or service(s). Separate aggregate purchase(s) may occur weekly, monthly, or annually.
<i>Approved Supplier List</i>	A list of suppliers or potential contractors who have demonstrated the ability to perform successfully under the terms and conditions of a proposed procurement, consideration being given to contractor integrity, compliance with applicable policy or regulations, record of past performance, and financial and technical resources.
<i>Arms-Length Transaction</i>	<p>Transaction in which the parties are dealing from equal bargaining positions — neither party is subject to the other’s control or dominant influence, and the transaction is treated with fairness, integrity, and legality.</p> <p><i>Less than Arms-Length Transaction</i></p> <p><i>A less than arms-length transaction occurs when a person responsible for making a purchase and appears to have a stake in the outcome is able to control or substantially influence the actions of others. This may include agreements between divisions of an organization; organizations under common control through common officers, directors, or members; and an organization and a director or employee of the organization and his or her immediate family.</i></p>
<i>Bid Guarantee</i>	Guaranteed percentage of bid price provided by the offeror at the time the offer is submitted. The CE must return all bid guarantees to all unsuccessful offerors when the contract is awarded and to the winning offeror as soon as the contract is signed.
<i>Bond</i>	Insurance agreement pledging surety for financial loss caused in connection with the contract. For school nutrition programs, if a loss occurs in connection with a contract related to program operations, the loss will be covered to the extent agreed upon in the bond.
<i>Brokers</i>	Independent sales agents who negotiate sales for manufacturers by working with food distributors and/or school nutrition operations.
<i>Buy American</i>	<p>Requirement for schools to purchase, to the maximum extent practicable, domestic commodities and products.</p> <p><i>A domestic commodity or product means an agricultural commodity that is grown in the United States <u>and</u> processed in the United States or that is processed in the United States substantially using agricultural commodities that are produced in the United States.</i></p>

<i>Code of Conduct</i>	<p>Set of written standards the CE must develop that outline the responsibilities of, or proper practices for, an individual or organization and which governs the following:</p> <ol style="list-style-type: none"> 1. Performance of the officers, employees, or agents engaged in contract awards and administration when the contract is funded in whole or in part by Food and Nutrition Service (FNS) program funds. 2. Methods of procurement including the requirement that the CE perform a cost or price analysis for every procurement (including contract modifications) and determination of which contract clauses and certifications are required in the CE's contracts.
<i>Conflict of Interest</i>	Any action that allows a person to benefit at the expense of the public interest or the expense of their employer.
<i>Contract</i>	Formal, legally enforceable agreement (terms and conditions) between a buyer (the CE) and a seller (contractor) that clearly and accurately describes the products and/or services to be delivered or performed and sets forth the method and the compensation the contractor receives when products and/or services are provided.
<i>Cooperative Purchasing</i>	Group of entities who join together to purchase products and/or services with the intention of reducing costs and improving the quality of products and/or services available to members of a group.
<i>Cost Index</i>	Tool that is designed to show the impact of an economic measure on the price of purchasing a specific type of item.
<i>Cost Plus Percentage Cost</i>	Method of pricing where the contract or agreement creates a pricing structure that charges the cost of the product or service plus a percentage of cost. This pricing structure is not allowable for any purchase under USDA regulations. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
<i>Cost Reimbursable Contract</i>	Reimbursable contract that is 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 a fixed fee or with a cost-reimbursement fee. In a cost reimbursable contract, allowable costs will be paid from the nonprofit school nutrition account to the contractor net of all discounts, rebates, and other applicable credits accruing to or received by the contractor. In a cost reimbursable contract, the fixed price (fee) includes the contractor's direct and indirect administrative costs and profit allocable to the contract.
<i>Debarment</i>	Action taken by a debaring official to exclude a person from participating in covered transactions. ⁵ A person so excluded is <i>debarred</i> , that is, unable to participate.
<i>Distributor</i>	Commercial food company that purchases, receives, and/or stores commercial food products and then sells, delivers, and bills the recipient agency for goods and/or services provided.
<i>Drop Delivery</i>	Delivery to one location within the CE, such as a central warehouse.
<i>Economies of Scale</i>	Purchase of large quantities of a product and/or service in order to obtain a better price.

⁵ Covered transactions in this section refer to transactions related to child nutrition programs.

<i>Escalator/De-escalator Clause or Market-based Pricing</i>	Predetermined provisions in a contract stipulating specific conditions for an increase or decrease in price.
<i>Ethics</i>	Moral standards individuals use to guide decisions in their personal and professional lives. School nutrition professionals have a responsibility to act ethically in accordance with all federal, state, and local guidelines.
<i>Firm Fixed-price Contract (Also Called Firm Price Contract)</i>	Contracts that provide products and/or services for a price not subject to adjustment other than increases or decreases tied to an economic indicator stipulated by contract. Firm fixed-price contracts are usually negotiated where reasonably finite specifications and/or technical requirements are available, and costs can be estimated with reasonable accuracy. A fixed-price contract places minimum administrative burden on contracting parties, but subjects a contractor to maximum risk arising from full responsibility for all cost escalations.
<i>Fixed-Price</i>	Agreed upon amount of money that is fixed at the inception of a contract and is guaranteed for a specific period of time. A fixed-price contract may also contain an economic cost adjustment provision tied to the Consumer Price Index (CPI) Food Away from Home.
<i>Fixed Price (Fee)</i>	Agreed upon amount of money that is fixed at the inception of the contract.
<i>Food Service Management Company (FSMC)</i>	Any organization, whether commercial enterprise or a nonprofit organization, that is or may be contracted by the CE to manage any aspect of the school food service. ⁶
<i>Forecasting</i>	Process of analyzing current and historical data to determine future procurement trends. In the case of school nutrition programs, forecasting involves predicting and estimating the goods, works, and services needed in specified areas for the coming year, and/or assessing needs by reviewing current procurement activities. Forecasting allows for procurement timelines and tasks to evolve each fiscal year.
<i>Full and Open Competition</i>	Situation where all potential contractors are competing on a level playing field and have the same opportunity to compete and be awarded a contract. Full and open competition is also commonly referred to as <i>free and open competition</i> .
<i>Grade Standards</i>	USDA quality standards based on measurable attributes that describe the value and utility of the products.
<i>Grantees</i>	Governmental or other legal entity to which a grant is awarded where the receiving entity is held accountable for the use of the funds provided. The grantee is the entire legal entity <u>even if</u> only a particular component of the entity is designated in the grant award document.
<i>Incentives</i>	Rewards or benefits received as a result of performing requested actions and/or meeting predetermined milestones.

⁶ If an NSLP CE operates a Child and Adult Care Food Program and/or Summer Food Service Program, there may be additional regulations that applied for the use of an FSMC to operate the program.

<i>Internal Controls</i>	Processes or procedures established by the CE that (1) define actions related to the procurement process, (2) establish standards of ethical conduct, and (3) provide full and open competition.
<i>Invitation for Bid (IFB)</i>	Formal method of procurement that uses sealed bidding and results in a fixed-price contract with or without adjustment factors.
<i>Just-in Time (JIT)</i>	Food and supplies kept in quantities an entity anticipates will meet its immediate needs which results in the entity maintaining a low inventory level.
<i>Lead Time</i>	Amount of time necessary for a distributor to prepare and deliver products and/or services to the CE.
<i>Local Product</i>	Unprocessed locally grown or raised agricultural products that retain their inherent character.
<i>Managing the Contract</i>	Procedures the CE has in place to ensure that contractors perform in accordance with the terms, conditions, and specifications and/or technical requirements of their contracts or purchase orders.
<i>Market Basket</i>	Solicitation strategy that encourages the submission of varied pricing options for a finite number of products and/or services. Each product and/or service on the list must have (1) a description with the quantity to be purchased, (2) specifications and/or technical requirements for each product and/or service, and (3) a description of how each product and/or service will be awarded on the contract.
<i>Material Change</i>	Change made to a contract after the contract has been awarded that alters the terms and conditions of the contract substantially enough, that, had other offerors known of the change in advance, they may have bid differently and more competitively.
<i>Micro-purchase Method</i>	Single purchase or transaction with an aggregate total cost that does not exceed \$3,500 whether that purchase occurs weekly, monthly, or annually.
<i>Noncompetitive Method</i>	Procurement method used when there is an insufficient number of offers submitted in response to a solicitation. In this case, full and open competition is deemed inadequate, and there is no way to remedy the situation.
<i>Open Award</i>	Contract award in which all vendors that submit an offer are awarded a contract. This type of award does not promote full and open competition or pricing that is advantageous to the program. An open award is not the same as using a market basket strategy.
<i>Operator</i>	Entity that operates a Child Nutrition Program.
<i>Operator-Only Cooperative</i>	Any type of agreement that is formed solely among CNP operators including regional education service center (ESC) cooperatives.
<i>Pass Through Entity</i>	Entity receiving federal funds that have passed through another entity. This definition is specific to funding from federal sources and applies to state agencies, CEs, group purchasing cooperatives, and third-party entities. These funds are used to fulfill the purposes for a federally funded program.
<i>Payment Bond</i>	Bond which covers the cost of materials and works for construction contracts.
<i>Performance Bond</i>	Bond which covers the cost of ensuring that the work is done as specified in the terms of the contract.

<i>Procurement</i>	Act of obtaining of goods or services in exchange for money or value. [NOTE: Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.]
<i>Procurement Standards</i>	Standards of conduct that shall govern the performance of the CE's officers, employees, or agents in contracting for payment and expending program funds. State and federal procurement regulations require each CE to maintain written standards of conduct including a code of conduct that prohibits employees from participating in the selection, award, and administration of any contract to which an entity or certain persons connected to them, have financial interest.
<i>Program Integrity</i>	An organized and structurally sound financial management system that promotes program efficiency and prevents the inappropriate use of program funds.
<i>Proprietary Products</i>	Manufactured products ordered specifically for a particular program or are unique to a manufacturer.
<i>Reasonable Cost</i>	Amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.
<i>Regulatory Authority</i>	Oversight authority dictated by legislative act or regulation.
<i>Request for Proposals (RFP)</i>	Formal procurement method where potential contractors submit an offer to provide products and/or services under a fixed-price or cost reimbursable type contract.
<i>Responsible</i>	Capable of providing the product(s) and/or service(s) as described in the solicitation.
<i>Responsive</i>	Offer that addresses terms and conditions of the solicitation including the specifications and/or technical requirements for product(s) and/or service(s).
<i>Service Fee</i>	Fee charged for the performance of a specific service.
<i>Simplified Acquisition Threshold (Also Called Small Purchase Threshold)</i>	An amount established by federal, state, or local regulations that defines when formal and informal procurement methods must be used.
<i>Sole Source Method</i>	Noncompetitive procurement method used when products and/or services are available from only one supplier, distributor, or contractor. TDA must approve all sole source methods of procurement.
<i>Solicitation</i>	Process of notifying prospective or qualified offerors about the specifications or technical requirements for purchase of products and/or services. For informal procurement, the solicitation may be communicated by email, in person, by fax, or by phone as long as the person soliciting offers documents the specifications or technical requirements to ensure that every possible contractor is given the same information. For a formal procurement, a written solicitation is required.
<i>Subgrantees</i>	Governmental or other legal entity to which a subgrant is awarded and is accountable to the grantee for the use of the funds provided.

<i>Supplier (Sometimes Called Vendor)</i>	Commercial enterprise, public or nonprofit private organization, or individual that enters into a contract with a CE to provide products and/or services. A supplier is also referred to as an offeror during the solicitation phase of procurement.
<i>Specifications and Technical Requirements</i>	Detailed information included in the solicitation and in the final contract that describes the product(s) and/or service(s) that will be provided to the CE under the contract.
<i>Third Party</i>	Entity that is contracted to act on behalf of another entity.
<i>Third Party Cooperative</i>	<p>Any type of cooperative agreement that is formed by sources that are external to CEs which includes the following types of cooperatives:</p> <p><i>Non-Child Nutrition Program State Agency Procurement Agency Agreements</i> <i>Intergovernmental agreements with the State which may include public, private, and nonprofit entities and are conducted for State facility needs using State procurement standards. These agreements allow local educational agencies and other Child Nutrition Program operators to purchase from the State's contracted sources.</i></p> <p><i>Interagency Agreements</i> <i>Public, private, and nonprofit entities formed for the purpose of procuring goods and services</i></p> <p><i>Group Purchasing Organizations, Group Buying Organizations, and Third-Party Vendors (Collectively Referred to as GPOs)</i> <i>CNP and non-CNP operators such as public and private schools, hospitals, universities, law enforcement, public works, etc., who join a third-party company or service provider. A GPO may be a for-profit or a nonprofit entity. Typically, a GPO includes a membership fee for those granted access to the GPO price list of products and services.</i></p>
<i>Transaction</i>	Occurrence in which two or more entities exchange goods, services, or money between them or among them under an agreement formed for their mutual benefit.
<i>Unallowable Cost or Expense</i>	Cost or expense which cannot be paid using school nutrition program funds. This includes costs and expenses incurred by the CE as well as any third party acting on behalf of the CE. <i>Disallowed</i> is sometimes used in place of <i>unallowable</i> .
<i>Value</i>	Something of monetary or material worth or something that has usefulness that can be exchanged for something of worth, merit, or importance.
<i>Velocity Report</i>	Report providing the quantity, date of purchase, and other valuable information for specific products and/or services purchased by CEs used to assist with forecasting future purchasing needs.
<i>Vendor Participation Fees</i>	Charge to participate. The charge to participate may be paid by the participant, or it may be paid by those providing products and/or services.

*Written
Procurement
Procedures*

Procedures that define the critical steps in determining the method of procurement to be used, roles, and responsibilities of staff when procuring products and/or services, and methods for monitoring procured products and/or services. For this section, the term procedure is used to refer to processes, protocols, standards of behavior, expectations, or any other written method of describing actions staff are to take related to procurement. Written procurement procedures may include a procurement plan with timelines and tasks, or a procurement plan may be a separate document from the procedures.

Written Procurement Procedures

CEs are required to have written procurement procedures that reflect applicable local, state, and federal regulations that include, but are not limited to, checks and balances that provide internal controls for all financial matters.

For this section, the term *procedure* is used to refer to processes, protocols, standards of behavior, expectations, or any other written method of describing actions staff are to take related to procurement.

CEs may have a set of overarching procedures at the CE level and more detailed procedures at the site level. Or they may have a single set of procedures that are applied at all levels. CEs may include a procurement plan or schedule with timelines and tasks by type of procurement, type of product, or type of service as a separate document or incorporate it into their written procedures.

These procedures are intended to guide staff as they take procurement actions and define the roles and responsibilities for all involved in procurement.

Procedures which define the CE's internal controls for procurement must achieve the following:

Internal Controls Must

- define actions related to the procurement process,
- establish standards of ethical conduct, and
- provide full and open competition.

To ensure that there is full and open competition, CEs should consider the following questions as they assess their procurement procedures:

- Does it promote competition among offerors?
- Is the solicitation promoting full and open competition?
- Did the procurement procedure create a competitive environment?

Written Procurement Procedures, General Standards

CEs must have written procedures for the selection, award, and administration of procurement transactions that include an explanation of how the CE will address the following issues:

General Elements

- Full and open competition
- Methods for the identification of possible suppliers for products and/or services procured with the small purchase method
- Equitable⁷ distribution of micro-purchases among all suppliers
- When and how to give preference to local suppliers, including a definition of *local*⁸

[NOTE: A definition for local supplier may be different for different types of products and/or services because of the availability to potential suppliers. If the definition for local is too restrictive, it may limit full and open competition.]

- Strategies for forecasting or predicting future products and/or services that will need to be procured
- Timeline for procurement actions
*USDA recommends that at least 45 days be allowed for invitation for bid procurements and 60 days for request for proposal procurements.*⁹
- Thresholds or characteristics that mandate a specific type of procurement method: micro-purchase, small purchase, invitations for bid (IFB, also called sealed bids), or competitive requests for proposal (RFP)
- Utilization of a pricing structure that does not include cost plus percentage of cost. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

⁷ In this case *equitable* means *fair* or *balanced* distribution.

⁸ See the *Local Preference* subsection of this section for additional information using local preference.

⁹ See the *Procurement Purchasing Methods* subsection in this section for additional information on these procurement methods.

Economy and Efficiency

- Strategies to increase greater economy and efficiency in purchasing.

Unnecessary or Duplicative Products and/or Services

Consideration of when consolidating or breaking procurements to more than one contract lead to a more economical purchase.

- Effective forecasting strategies will assist the CE in developing accurate solicitations.
- Where appropriate, the CE will conduct an analysis of lease versus purchase alternatives or any other appropriate analysis to determine the most economical approach to procuring products and/or services.

Intergovernmental Agreements or Inter-Entity Agreements

To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services, the CE is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

Excess and Surplus Property

CEs are encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs. This includes, but is not limited to, USDA Foods.

Forecasting

- Strategies and processes for evaluating a variety of factors in order to predict quantities of products and/or services to be procured.

Proper forecasting is integral to full and open competition. Effective forecasting helps to ensure that the CE is able to develop a solicitation that includes accurate specifications and/or technical requirements. When forecasting is done well, there is less likelihood that a material change¹⁰ will occur.

The following factors should be considered in forecasting:

- Student enrollment, current and projected
- Student average participation, current and projected¹¹
- Future campus realignment including new schools

¹⁰ See *Material Change* in the *Contract* subsection in this section for additional information on this topic.

¹¹ The monthly *Daily Record/Accuclaim* forms for each site provide this information. This form is available at www.squaremeals.org.

- Available and future product storage
- Velocity reports (amount ordered/used or served in the past)
- Planned changes specific to products and/or services (menu offerings, adding operation of a different school nutrition program or child nutrition program¹² at a site or sites, results from taste and acceptability activities)

When a CE is unsure about the impact of any of these factors on the quantity to procure, the CE may opt for a shorter period of time for the contract. The shorter period of time gives the CE greater control of the inventory and allows the CE to easily make adjustments.

While a CE may include flexibility in the solicitation and contract that indicates an estimated range of quantities, the CE will receive more competitive pricing if its estimates are more precise. Moreover, if the adjustments over time result in a material change to the contract, the CE must rebid the contract.¹³

Managing the Procurement Process

Contract Award

- Method or strategy for awarding contracts including staff positions responsible for approval of contract awards based on type of procurement method.

Local Preference

- Manner in which local preference will be applied to solicitations and definition or definitions the SNP will use for local preference.¹⁴

Noncompetitive Processes, Including Sole Source

- Method for obtaining required information when a noncompetitive procurement can be conducted including a sole source purchase.¹⁵

¹² Other child nutrition programs include Child and Adult Care Food Program (CACFP) and Summer Food Service Program (SFSP).

¹³ See the *Material Change* subtopic in the *Contract* subsection in this section for additional information on this topic. An unallowable cost or expense cannot be paid using school nutrition program funds.

¹⁴ See the *Local Preference* topic in the *Other State and Federal Regulations* for additional information on using local preference. See also USDA's *Procuring Local Foods for Child Nutrition Programs* available at www.fns.usda.gov/farmtoschool/procuring-local-foods.

¹⁵ See the *Sole Source Method* subtopic in the *Procurement Purchasing Methods* subsection in this section for additional information.

Monitoring

- Process for staff assigned to ensure that contractors perform in accordance with the terms, conditions, specifications, and technical requirements of the contracts or purchase orders.
- Process for staff responsible for the settlement of all contractual and administrative issues arising out of procurements.

These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

Protests

- Process for assigned staff to respond to and resolve all bid protests.¹⁶

Purchasing System

- Schedule for purchasing so that the CE is able to better forecast future needs.
- Management tools and strategies that promote effective organizational systems and consistent procurement activities across school nutrition programs and other large ongoing projects.
- Strategy to identify all tasks in proper sequence and plan enough time to accomplish all tasks which includes established bid periods for the products and/or services to be purchased.
- Process to approve and make payments for awarded contracts including methods for ensuring that product and/or service invoices are received as prescribed by the contract.

Solicitation

- Process for developing a solicitation that includes the development of specifications and/or technical requirements for the products and/or services to be purchased.¹⁷
- Method or strategy for advertising solicitations for contracts based on type of procurement.

¹⁶ See the *Protests* subsection in this section for additional information on this topic.

¹⁷ See the *Solicitation* subsection in this section for additional information on this topic.

- Method for determining the content for advertising solicitations for contracts based on type of procurement.
- Criteria for making an award including the method used to determine which offeror is the most responsible and responsive and provides the best price for the products and/or services for each type of procurement method.
 - *Responsible*: capable of providing products and/or services as described in the solicitation.
 - *Responsive*: pricing information specific to the products and/or services to be purchased as described in the solicitation.

Records Retention

- Description of routine procedures and timelines for retaining required documentation that demonstrates the history of all procurement actions.¹⁸

Written Procurement Procedures, Ethical Standards (Code of Conduct)

CEs must have written procedures that include ethical standards or a code of conduct that govern the performance of employees, officers, and agents of the CE that are engaged in the selection, award, and administration of the contracts.

Conflict of Interest Disclosure

The written procurement procedure must include a method for an employee to disclose in writing any potential conflict of interest.¹⁹ The written code of conduct procedures must include the following:

Conflict of Interest

- ***Affiliated or Subsidiary Associations.*** If the CE has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the CE must also maintain written standards of conduct covering organizational conflicts of interest.

Because of relationships with a parent company, affiliate, or subsidiary organization, there is a possibility of organizational conflict of interest where the CE or entity acting on behalf of the CE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

The CE's written procedure must provide an explanation of how it will avoid any conflicts of interest based on affiliated or subsidiary associations.

¹⁸ See the *Records Retention* subsection in this section for additional information on this topic.

¹⁹ The Texas Education Agency (TEA) requires that school districts and charter schools use *Form 1295, Certificate of Interested Parties* for this purpose. CEs may include the use of this form to address potential conflicts of interest in NSLP and SBP procurement.

- **Benefits Received.** A school nutrition program employee, officer, or agent of the CE must not solicit or accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

When incentives are offered by the contractor and accepted by the CE, the incentive must become the property of the SNP. Under no condition can the incentive become the property of an individual.

Staff Purchase of Items on the CE's Contract. Benefits received includes opportunities for employees, officers, or agents of the CE to purchase items under awarded contracts. When a person purchases an item at the contract price or at another discounted price, the person is actually accepting the cash difference between the bid or discount price and the amount the person would have paid for the item in the regular retail market. Therefore, this type of purchase has benefits received and is therefore an unallowable practice. Even if the contractor were to charge retail price, the person would still be receiving the convenience of a personal delivery and would be accepting a favor from the contractor— therefore, this is an unallowable practice.

CEs should also remember that incentives may result in higher prices, lower quality, or both and that special prices are sometimes offered on old merchandise that the contractor wants to move.

The CE's written procedure must provide an explanation of how it will avoid unallowable practices based on benefits received.

- **Real or Apparent Conflict of Interest.** If a school nutrition program employee, officer, or agent of the CE or entity acting on behalf of the CE has a real or apparent conflict of interest, the employee, officer, or agent of the CE cannot participate in the selection, award, or administration of a contract supported by the SNP. A decision based on a personal relationship or friendship with a possible contractor is also a conflict of interest. CEs may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.

When an employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties or has a financial or other interest in or a tangible personal benefit from an entity considered for a contract, there is a conflict of interest.

If the CE has a question about whether a specific situation is a conflict of interest, the CE should consult with CE's legal attorney.

In its written procedures, the CE must provide an explanation of how it will avoid real or apparent conflict of interest which includes the following:

- Disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the CE.
- Guidance to CE staff on how to avoid undue influence.

Certification Regarding Lobbying

- Applicable to grants, subgrants, cooperative agreements, and contracts exceeding \$100,000 in Federal Funds. CEs must submit a certification regarding lobbying as a prerequisite for making or entering into a transaction which states the following:
 1. No Federally appropriated funds have been paid or will be paid by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of a Federal contract, the making of a Federal grant, the making of a Federal loan, the entering into a cooperative agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement.
 2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "disclosure Form to Report Lobbying," in accordance with its instructions.
 3. The undersigned shall require that the language of this certification be included in the award documents for all covered subawards exceeding \$100,000 in Federal funds at all appropriate tiers and that all subrecipients shall certify and disclose accordingly.

Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Debarment and Suspension

- **Debarment and Suspension Certification.** CEs and their subcontractors must not make or permit any award, subaward, subgrant, or contract with an individual or entity that is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs.

In its written procedures, the CE must define how it will obtain a debarment and suspension certification from each of its contracts. The CE may use any of the following actions to accomplish this purpose:

- Include the following debarment and suspension certification in the written agreement with the subcontractor:

{Enter name of subcontracting organization} certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this Agreement by any federal department or agency or by the State of Texas. {Enter name of subcontracting organization} shall immediately provide written notice to {Enter name of CE} if at any time the {Enter name of subcontracting organization} learns that this certification was erroneous when submitted or has become erroneous by reason of changed circumstances. {Enter name of CE} may rely upon a certification of a subcontractor that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered contract, unless it knows that the certification is erroneous.

- Require the subcontractor to sign and submit the TDA form entitled *Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion for Covered Contracts (H2048)*²⁰ and maintain the signed form with its contract record.
- Print the page from the System for Award Management which indicates the subcontractor is not presently debarred or otherwise excluded from participation in the contract by any federal department or agency or by the State of Texas and maintaining that document on file with the contract documents. The System for Award Management can be accessed at www.sam.gov/portal/SAM/#1.

Evaluation of the Bid and Award of Contract

Responsible Contractors

The CE must only award contracts to responsible contractors who possess the ability to perform successfully under the terms and conditions of a proposed procurement and contract.

When determining if a contractor is responsible, the CE will consider the bidding contractor's integrity, compliance with public policy, record of past performance, and financial and technical resources.

²⁰ Available at www.squaremeals.org

Responsive Contractors

When a CE is evaluating the documentation submitted by an offeror, the CE must only consider elements that are specifically responsive to the technical requirements presented in the solicitation for offers.

Contractor provided incentives (bonuses, stamps, equipment, or other benefits) that will be received by the CE, the school nutrition program, or enrolled students that may influence the contract award must be treated the same as a gratuity, favor, or anything of monetary value given to a school nutrition program employee, officer, or agent of the CE. These kinds of incentives are nonresponsive or overly responsive elements and must not be considered in awarding the contract. See *Benefits Received in the Written Procurement Procedures, Ethical Standards (Code of Conducts)* subsection in this section for more information on this topic.

Contracting with Persons and Companies for Assistance in Developing a Solicitation

When acquiring goods and services, contracting entities (CEs) may contract with persons and companies to provide technical information that the CE may use in drafting procurement specifications and/or technical requirements. This provision is intended to encourage program administrators to obtain information from as many sources as possible to assist them in drafting procurement documents.²¹

Potential Offerors or Interested Parties Involved in Developing a Solicitation

A potential contractor or other interested party cannot participate in the procurement process by assisting with or drafting the procurement specifications and/or technical requirements, procedures, or documents.

For Example: If a food service management company (FSMC) provides a cycle menu to be included in a solicitation, the FSMC cannot submit an offer for the contract.

If a potential consultant contractor writes a job description for the scope of work to be included in the solicitation, the consultant cannot submit an offer for the contract.

Violation of Ethical Standards (Code of Conduct)

The CE must have written procedures that describe the disciplinary action that will occur if an employee does not follow the CE's ethical standards for procurement (code of conduct).

²¹ See the *Potential Offerors or Interested Parties Involved in Developing a Solicitation* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on requirements related to this assistance.

Written Procurement Procedures, Full and Open Competition Standards

All procurement transactions must be conducted in a manner that provides full and open competition to all entities that choose to participate. Full and open competition means that everyone is on a *level playing field* and has the same opportunity to compete for the purchase of products and/or services. Full and open competition fosters decreased costs and increased quality of products and/or services.

There are two questions that are vital in determining if there has been full and open competition:

1. Is there an adequate number of possible offerors that are able to submit offers to the solicitation?
2. Were there an adequate number of offerors who submitted responses or offers to the solicitation?

Barriers to Full and Open Competition

Situations considered to be restrictive of full and open competition include, but are not limited to, the following:

- Any arbitrary action in the procurement process
- Overly restrictive definition for local when applying local preference²²
- Organizational conflicts of interest
- Placing unreasonable requirements on firms in order for them to qualify to do business
- Requiring unnecessary experience and excessive bonding²³
- Noncompetitive pricing practices between firms or between affiliated companies
- Noncompetitive awards to consultants that are on retainer contracts²⁴
- Specifying only a brand name product instead of allowing an equal product to be offered²⁵

²² See the *Local Preference* subsection in this section for more information on using local preference.

²³ See the *Bonding Requirement* subtopic in the *Other State and Federal Regulations Related to Contracts* subsection in this section for additional information on this topic.

²⁴ A contract in which a contractor is paid an upfront fee for anticipated services and/or products.

²⁵ See the *Use of Brand Names* subsection in this section for additional information on the use of brand names in solicitations.

Written Procurement Procedures, Cost Analysis

The CE must define the methods it will use to perform a cost analysis to estimate the cost of products and/or services to pre-estimate the cost for both formal and informal procurement methods before preparing the solicitation, and who is responsible for these efforts as well as contract modifications. In addition to the estimated cost of products and/or services, the cost analysis determines which contract clauses and certifications are required in contracts.

In conducting a cost analysis, the CE will use the tools that are also used in forecasting²⁶ as well as any other available tools or strategies that may help the CE to develop the estimated cost of the products and/or services. The method and depth of the cost analysis is dependent on the complexity of the products and/or services to be purchased. Generally, the cost analysis for a formal procurement method is more in-depth than the cost analysis for an informal procurement method.

Full and Open Competition

Full and open competition is achieved when potential offerors receive all information necessary to respond properly to a solicitation and offers are accurately evaluated for contract award. To this end, the CE must evaluate its procurement actions as they are implemented to ensure that there is full and open competition.

Prior to Issuing the Solicitation

During the development of the solicitation, the CE must determine if the specifications, technical requirements, terms, and conditions in the solicitation will limit the number of possible offerors that are able to bid or respond to the solicitation to an inadequate number²⁷—restrict full and open competition.

Are there enough potential offerors that can meet the specifications, technical requirements, terms, and conditions as described in the solicitation to hold a competitive procurement process?

- If there are not an adequate number of possible offerors to foster competition, the CE must modify the solicitation as necessary and reissue the solicitation.

[NOTE: An inadequate number of offers does not automatically indicate that the CE should pursue a noncompetitive procurement method. A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base and not a lack of contractors or vendors capable of supplying the products and/or services to be procured. Therefore, the CE must provide

²⁶ See the *Forecasting* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on this topic.

²⁷ Adequate number is based on the type of procurement method. See the *Procurement Purchasing Methods* subsection for information on how adequate number is defined for each type of procurement.

notification that the CE is not awarding a contract, review its solicitation, make appropriate changes to the solicitation, and reissue the solicitation.]

- If there is an adequate number of possible offerors, the CE should issue the solicitation and move to the next step in its procurement procedure.

After Offers Are Received

When all offers have been received, the CE must determine if the specifications, technical requirements, terms, and conditions as described in the solicitation have limited the number of offerors who were able to submit an offer: Was there an adequate number of offers? Was full and open competition restricted?

Was there an adequate number of offerors that responded to the solicitation?

- If there is not an adequate number of offers submitted, the CE must determine how to address the identified limitations in its solicitation and/or in its method for public advertising and reissue the solicitation.

[NOTE: An inadequate number of offers does not automatically indicate that the CE should pursue the noncompetitive procurement method.²⁸ A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base and not a lack of contractors or vendors capable of supplying the products and/or services to be procured. Therefore, the CE must provide notification that the CE is not awarding a contract, review its solicitation, make appropriate changes to the solicitation, and reissue the solicitation.]

- If there are an adequate number of offers submitted, the CE should move to the next step in its procurement procedure.

Procurement Purchasing Methods

CEs must use their written procurement procedure to guide them in selecting the appropriate procurement method, including the appropriate cost analysis method.²⁹ There are two types of procurement methods that CEs may use—formal and informal. The decision to use informal or formal is based on the total estimated cost of the purchase and whether it does or does not exceed the simplified acquisition threshold (small purchase threshold).³⁰

²⁸ See the *Sole Source Method* subtopic in the *Procurement Purchasing Methods* subsection in this section for additional information on this topic.

²⁹ See the *Written Procurement Procedures* subsections in this section for additional information on this topic.

³⁰ In limited cases, a CE may be allowed to use a noncompetitive procurement method. See the *Noncompetitive Method* and *Sole Source Method* subtopics in the *Procurement Purchasing Methods* subsection in this section for additional information on this topic.

Before Selecting a Procurement Method

To identify the most appropriate procurement method, the CE must follow its written procurement procedures and retain all records related to the procurement. This includes, but is not limited to, conducting a cost analysis to determine the estimated cost for the products and/or services to be procured³¹ and all cost comparison documentation.

In all cases, the goal of the procurement process is for the CE to make the most economic and efficient use of federal funds while offering full and open competition.³² The choices the CE makes should be based on this objective.

Simplified Acquisition Threshold (Small Purchase Threshold)

The simplified acquisition threshold is the highest total cost that can be procured using the informal procurement method.

- If the purchase is *equal to or less* than the simplified acquisition threshold, the purchase may be made using an informal or formal method.
- If the purchase *exceeds* (greater than) the simplified acquisition threshold, the purchase must be made using the formal process.

[NOTE: A CE may use a formal method when a purchase is less than the simplified acquisition threshold in order to take advantage of economies of scale, i.e., purchase of larger quantities resulting in lower costs.]

Simplified Acquisition Threshold Chart (Based on Cost Analysis Estimated Amount of Purchase)	
Simplified Acquisition Threshold Purchase	<i>equal to or less (\leq) than threshold</i> <u>may</u> use an <u>informal or formal</u> procurement method.
	<i>greater than ($>$) than threshold</i> <u>must</u> use a <u>formal</u> procurement method.

Most Restrictive Simplified Acquisition Threshold

The CE must follow the most restrictive simplified acquisition threshold requirements that apply based on type of entity and the agency or organization that has regulatory authority (federal, state, or local) over the entity for all purchases. Each CE is responsible to ensure that it applies the correct simplified acquisition threshold based on its entity type and regulatory authority.

³¹ See the *Cost Analysis* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on this topic.

³² See the *Full and Open Competition* subsection in this section for additional information on this topic.

In Texas, most CEs operating NSLP and SBP will fall into one of three types of entities:

- **Governmental, regulated by the Texas Education Agency (TEA)**—These CEs must use the simplified acquisition threshold established by TEA.

As of October 12, 2015, the simplified acquisition threshold for public school districts and charter schools regulated by TEA is less than \$50,000. Less than \$50,000 means equal to or less than \$49,999.99.

CEs should verify that their simplified acquisition threshold amount has not changed since the date this section was released. CEs may also be subject to a lower simplified acquisition threshold based on local or other applicable state regulations.

TEA provides guidance on procurement and financial management at www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial_Accountability_System_Resource_Guide/.

- **Governmental not regulated by TEA**—These CEs must use the simplified acquisition threshold established by or adopted by the governmental agency that has regulatory authority for the CE.

As of October 12, 2015, the simplified acquisition threshold for Texas governmental agencies (unless the agency/regulatory authority establishes other regulations) is less than \$25,000. Less than \$25,000 means equal to or less than \$24,999.99.

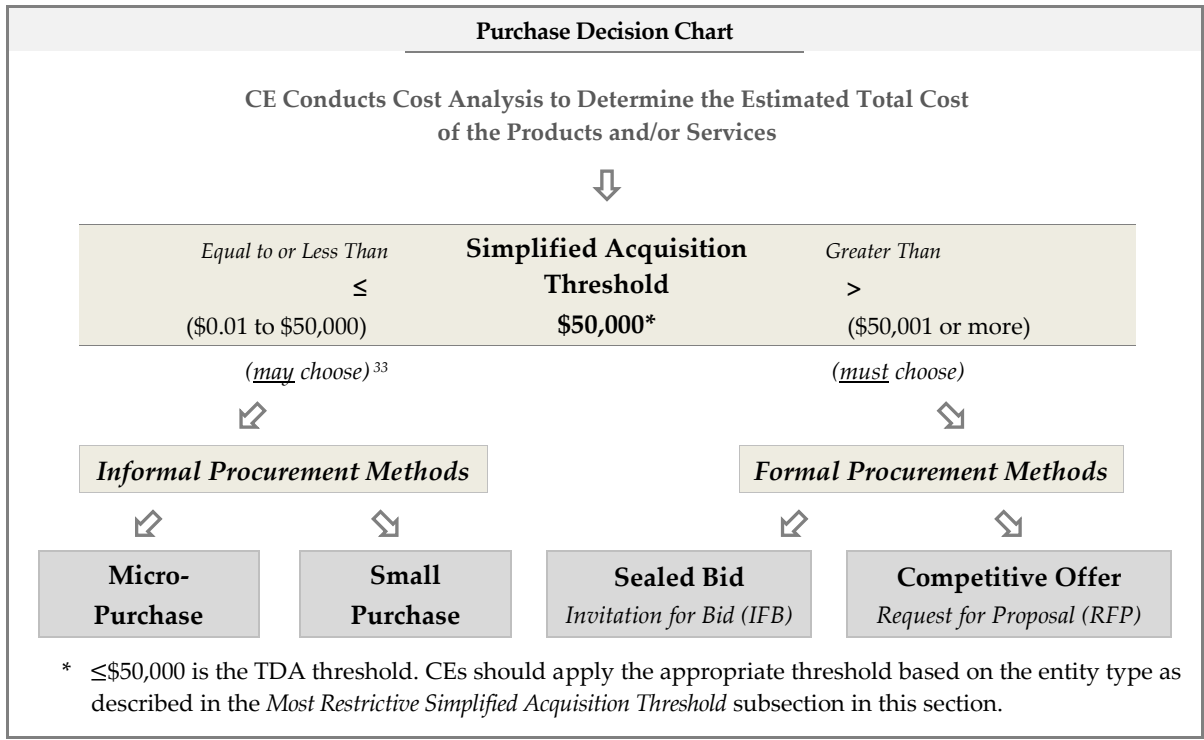
CEs should verify their simplified acquisition has not changed since this date. CEs may be subject to a lower simplified acquisition threshold based on local or other applicable state regulations.

The Texas Comptroller of Public Accounts website provides additional information and resources on financial management for governmental agencies at www.comptroller.texas.gov.

- **Nongovernmental**—These CEs must use the simplified acquisition threshold established by TDA, less than or equal to \$50,000.

CEs may be subject to a lower simplified acquisition threshold based on local or other applicable state regulations.

The *Purchase Decision Chart* demonstrates how the CE makes a decision on which procurement method to use. If a CE has a different threshold that applies, that threshold amount should be substituted for the TDA threshold in the chart.



Purchasing Through Auctions

If a CE chooses to make purchases through an auction, the CE must apply the procurement regulations to the purchase. CEs that make auction purchases typically use them for produce or other locally grown products. If the amount is under the simplified acquisition threshold, the CE may use the informal method. If the amount exceeds the simplified acquisition threshold, the CE must use the formal procurement method.

³³ CE may choose to use a formal procurement procedure for a total cost that is equal to or less than the simplified acquisition threshold in order to get a better price.

Informal Procurement Methods

If the cost analysis results in a total cost that does not exceed the simplified acquisition threshold, there are two informal procurement methods a CE may use—micro-purchase or small purchase method.

In the selection of the procurement method and actions related to the procurement, the CE must follow its written procurement procedure and retain all records related to the procurement. Any costs incurred as a result of improper procurement processes are unallowable costs to the school nutrition program.³⁴

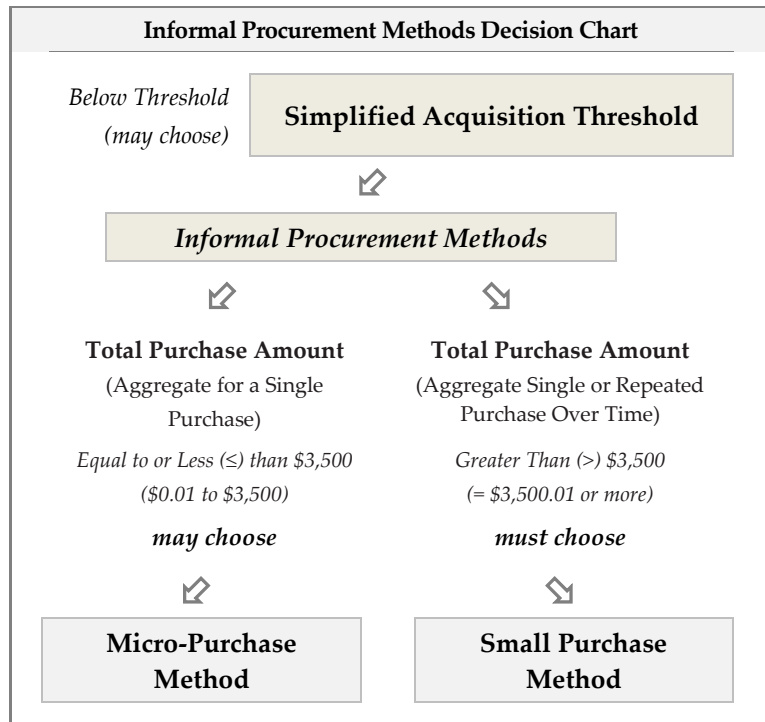
Micro-Purchase Method

The micro-purchase method is intended to minimize the burden for purchases of very small amounts. A micro-purchase is a single purchase or transaction that has a total aggregate cost that is equal to or less than \$3,500; total aggregate cost may consist of one product and/or service or multiple products and/or services. Separate aggregate purchases may occur weekly, monthly, or annually.

A micro-purchase may be appropriate in the following types of situations:

- The CE has insufficient refrigerated or storage space to store a large quantity of items. Therefore, the CE must break its purchases into smaller amounts in order to store food items safely.
- The CE is located in a remote area or is providing meals or snacks to a very small number of students, and there are few, if any, vendors willing or available to submit small purchase offers for the small quantity of products and/or services the CE needs to procure.

However, the small purchase method may be the more appropriate procurement method even though the total aggregate amount for a single purchase qualifies for a micro-purchase. If the CE purchases the same products and/or services frequently, the cost savings from using the small purchase method instead of the micro-purchase



³⁴ An unallowable cost or expense cannot be paid using school nutrition program funds.

method may be significant. In these cases, the CE must explore the benefits of using the informal small purchase method instead of a micro-purchase method.

Any costs incurred as a result of the CE intentionally breaking larger purchases into smaller amounts to qualify under the micro-purchase threshold are unallowable costs.³⁵

Micro-Purchase Scenario Chart		
Purchase Scenario	Is Micro-Purchase Applicable?	Questions to Ask
Single purchase or transaction for computer paper, ink cartridges, paper towels from the same supplier	If the total amount of the single purchase or transaction— aggregate amount— does not exceed \$3,500, the micro-purchase method may be used.	<ul style="list-style-type: none"> ◆ <i>Will these same items be purchased more than one time?</i>
Single purchase or transaction from Supplier 1 for computer paper and ink cartridges <i>and</i> Second single purchase or transaction from Supplier 2 for paper towels and cleaning supplies	If the amount of each purchase or transaction— aggregate amount— does not exceed \$3,500, the micro-purchase method may be used for each purchase or transaction.	<ul style="list-style-type: none"> ◆ <i>If so, what procurement method will result in the most economical purchase?</i> ◆ <i>Would the CE get a more competitive price by using a different procurement method?</i>
One year maintenance contract for a copier machine with a renewal option for an additional year.	If the total amount for the contract— aggregate amount— does not exceed \$3,500, the micro-purchase method may be used.	<ul style="list-style-type: none"> ◆ <i>Will the micro-procurement method result in the most economical purchase?</i> ◆ <i>Would the CE get a more competitive price by using a different procurement method?</i>

³⁵ An unallowable cost or expense cannot be paid using school nutrition program funds.

The following guidance must be used when making a micro-purchase.

- **Aggregate.** The aggregate total for a micro-purchase amount is the total cost for a single invoice for a single purchase or transaction. It is not an accumulation of weekly, monthly, or annual purchases—it is individual purchase with an individual invoice. However, the total cost for a micro purchase contract may be broken into multiple invoices which are paid when specified expectations are met. In this case, the aggregate is the total cost when all of the invoices are totaled.

Examples of Aggregate Amounts for Different Types of Micro-Purchases

One-Time Only Purchase: The CE bought \$137.16 in fresh apricots, figs, almonds, and fennel for a tasting event and a pound of ground clove as a once yearly purchase. If the tasting event goes well, the CE plans to add new menu items in the next school year. The invoice included 14 pounds of fresh apricots, 4 pounds of shelled almonds, 10 pounds of fresh figs, 8 pounds of fresh fennel, and 1 pound ground cloves. All items were listed on the same invoice, and the cost was paid in one payment. The total aggregate cost for this micro-purchase is \$137.16.

Delivery of a Single Purchase over a Period of Time: The CE ordered a computer, a printer, printer cartridge refills, printer paper, and a surge cord protector for a total of \$1,826.45. Some of the items were not in stock at the time of ordering. The computer, printer paper, and surge cord protector were delivered the day after the order was placed. The remaining items were delivered one week later. The vendor submitted each delivery invoice for payment on the day of delivery. Though the CE received two separate delivery invoices, the items were ordered in a single transaction. The total aggregate cost for this micro-purchase is \$1,826.45.

Very Small Routine Purchase: A small CE places an order for fresh produce (fruits and vegetables) every two weeks. Typically, the fresh produce order has a cost of less than \$150 dollars each two weeks. Because this is a routine purchase, the CE contacted multiple vendors to determine if there were vendors that would give the CE a better price through the small purchase method. However, the CE was not able to obtain a small purchase offer for bi-weekly, monthly, or quarterly purchases because of the small quantity and the fluctuating price of fresh fruit and vegetables. Since the CE cannot get quotes for a small purchase contract, the CE currently makes a separate purchase every two weeks using the micro-purchase method. Each bi-weekly purchase is a separate micro-purchase; therefore, each purchase has its own aggregate amount. The CE has created a plan for equitable distribution of purchases and has documented its efforts to obtain small purchase quotes and its equitable purchasing process.

- **Buy American.** The Buy American provisions apply to micro-purchases.³⁶

³⁶ See the *Other State and Federal Regulations Related to Contracts* subsection in this section for additional information on this topic.

- **Competitive Purchasing.** Micro-purchases do not require the CE to solicit quotes or compare prices as long as the price is reasonable.³⁷
- **Cost Analysis.** When using the micro-purchase method, a formal cost analysis is not required. However, the CE must have a method to document that the cost of the products and/or services is reasonable (for example, a cost comparison). Acceptable documentation includes, but is not limited to, the following:
 - Newspaper advertisements from various suppliers/vendors
 - Online advertisements from various suppliers/vendors
 - Documentation of phone quotes from various suppliers/vendors to include
 - Supplier/vendor name
 - Name of person providing information
 - Date(s) of contact
 - Information provided, including pricing for product and/or service

Other documentation that allows TDA to determine the cost was reasonable if price wasn't the determining factor, such as:

- Maps showing distance between vendors when distance is the factor
 - Written procedures that specify micro-purchase must be used because space is the factor, such as refrigeration and storage space
- **Equitable³⁸ Purchasing.** Purchases must be distributed among all qualified suppliers that are able to provide the products and/or services at a reasonable cost. The CE cannot make all of its micro-purchases from one qualified supplier.

The CE must include a description of how it will use equitable distribution of micro-purchasing among qualified suppliers in its written procedures.

However, CEs that are located in rural areas may be limited in their ability to distribute purchases equitably or in a fair and balanced distribution among a number of qualified merchants or suppliers because it is not economically feasible to do so, i.e. cost and time of travel.

³⁷ For procurement, *reasonable* is defined as an amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.

³⁸ In this case *equitable* means *fair* or *balanced* distribution.

In these cases, the CE must document the reasons when it is not feasible for the CE to distribute purchases among a variety of suppliers. Documentation might include a mileage chart listing the distance to the next closest store or printout of an online map demonstrating the driving distance. This exception will not apply in non-rural areas.

- **Routine Purchasing.** Routine purchases must not be broken into smaller purchase amounts in order to qualify for micro-purchasing.

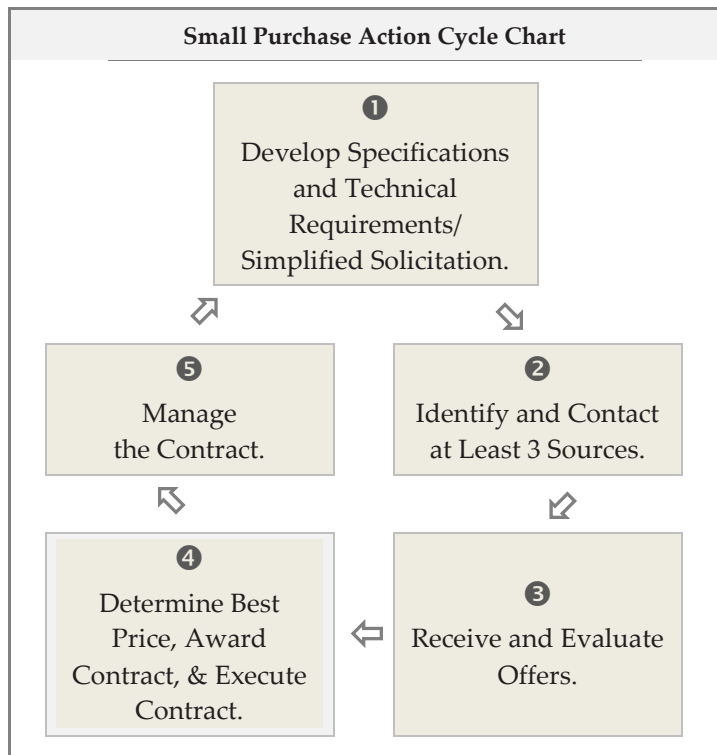
If the CE is routinely using the micro-purchase method for the same items, the CE must maintain documentation that demonstrates why this is the most suitable method for purchasing these products and/or services and why the use of another procurement method is not possible or reasonable.

Small Purchase Method

A small purchase is appropriate when the products and/or services has an aggregate total for a single purchase or total purchase that is equal to or less than the simplified acquisition threshold. The small purchase method results in a contract between the CE and the contractor.

Any costs incurred as a result of the CE intentionally breaking larger purchases into smaller amounts to qualify under the simplified acquisition threshold are unallowable costs to the school nutrition program.³⁹

To obtain a cost savings, a CE may use the small purchase method instead of the micro-purchase method if the amount of the purchase is equal to or less than the simplified acquisition threshold or may use the formal procurement method for purchases that qualify for informal purchasing methods.



³⁹ An unallowable cost or expense cannot be paid using school nutrition program funds.

The following guidance must be used when making a small purchase.

- **Aggregate.** The aggregate total for a small purchase amount is the total amount of the cost for a single purchase or the total cost for grouped purchases made over an extended period of time (such as a product delivered once a week or twice a month). In this case, the aggregate is the total cost. The total cost for a small purchase contract may be broken into multiple invoices which are paid when specified expectations are met. In this case, the aggregate is the total cost when all of the invoices are totaled.

For Example: Purchase 1, the CE procured \$6,278.28 in fresh fruit and vegetables from a local vendor. The fruit was procured, ordered, and delivered all at one time with a single invoice. The total aggregate cost for this small purchase is \$6,278.28

Purchase 2, the CE procured and ordered \$21,983.61 in fruit and vegetables to be delivered every Monday for 4 weeks. Though the CE received 4 separate delivery invoices, the items were ordered in a single procurement transaction. The total aggregate cost for this small purchase is \$21,983.61.

- **Buy American.** The Buy American provisions apply to small purchases.⁴⁰
- **Competitive Purchasing.** When a CE uses the small purchase method, the CE must obtain price quotes from at least three responsible and responsive contractors.
 - Quotes may be obtained orally or in writing.⁴¹ The CE must retain documentation demonstrating the price quotes.
 - Responsible contractors are capable of providing the products and/or services described in the specifications and/or technical requirements.
 - Responsive contractors provide pricing information specific to the products and/or services to be purchased.

While a CE using a small purchase method may not have developed a formal solicitation document that is comparable to one developed for IFB or RFP, the CE must have some type of documentation that demonstrates the cost quotes, specifications, and technical requirements that were given to all offerors.

A CE may choose to issue an IFB or RFP for a small purchase. In that case, the CE should develop a solicitation as described in the *Formal Procurement Methods* subsection in this section for information on conducting competitive purchasing for this type of procurement method.

⁴⁰ See the *Buy American* subsection in this section for additional information.

⁴¹ See the *Records Retention* subsection in this section for additional information on documentation related to oral and written quotes.

- **Contract.** If the small purchase solicitation results in a contract, the CE must meet all requirements related to the development and use of a contract described in the *Solicitation, Contracts, and Managing the Contract* subsections in this section.
- **Cost Analysis.** When using the small purchase method the CE must, at a minimum, conduct a price comparison as is described in its written procurement procedures.⁴² The CE must retain documentation on cost comparisons.
- **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost plus percentage of cost. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
- **Routine Purchasing.** Routine purchases must not be broken into smaller purchase amounts in order to qualify for the small purchase method.

If the CE is routinely using the small purchase method for the same items, the CE must maintain documentation that demonstrates why this is the most suitable method for purchasing these products and/or services and why the use of another procurement method is not possible or reasonable.

[NOTE: If the CE routinely uses the small purchase method for the same products and/or services, the cost savings from using formal competitive offers may be significant.]

- **Solicitation.** The CE must maintain documentation that provides the specifications and/or technical requirements given to potential contractors who provided price quotes or any method the CE uses to compare prices. All possible contractors must be given the same solicitation information.

⁴² See the *Forecasting* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on this topic.

Formal Procurement Methods

When the total estimated cost of products and/or services exceeds the simplified acquisition threshold, the CE must use a formal procurement method. Formal procurement methods are intended to be a more rigorous and prescriptive process that promotes full and open competition⁴³ and results in lower prices.

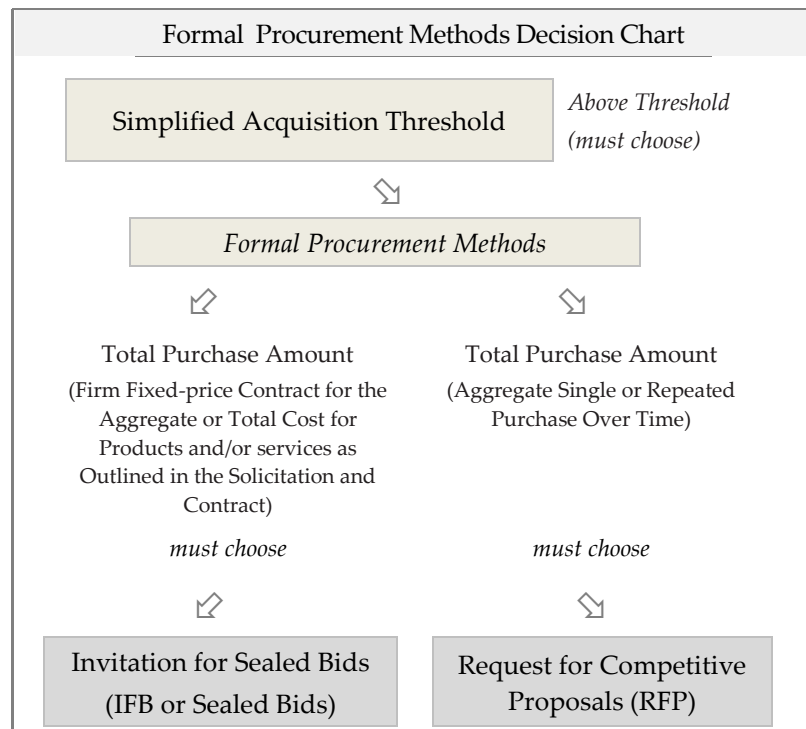
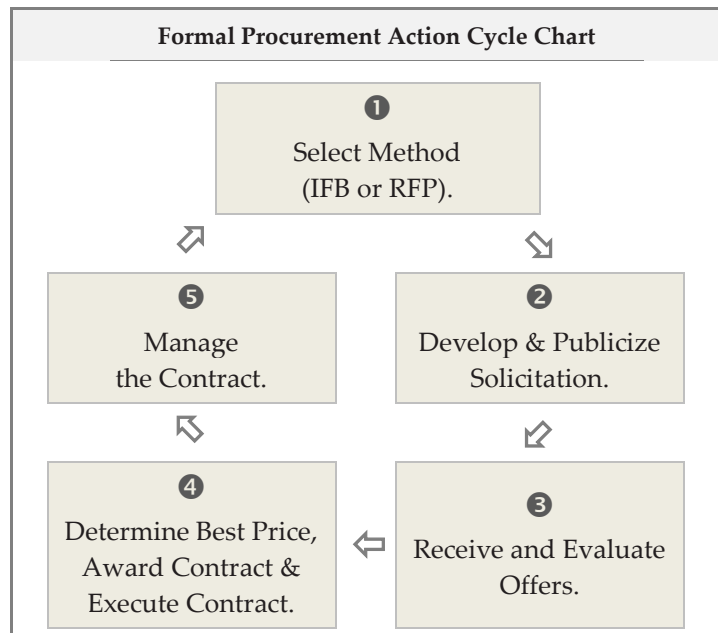
Any costs incurred as a result of improperly procured products and/or services are unallowable costs to the school nutrition program.⁴⁴

Invitation for Sealed Bids (IFB)

An IFB is a competitive procurement method for a fixed-price contract where sealed bids are submitted.

An IFB is an ideal procurement method to use when the offers will only differ in price for lump sum or unit pricing. It is commonly used for a fixed-price contract and is most effective when there are clear specifications and/or technical requirements.

An IFB contract is awarded in writing to the most responsible and responsive offeror whose price is most advantageous to the program.



⁴³ See the *Full and Open Competition* subsection in this section for additional information on this topic.

⁴⁴ An unallowable cost or expense cannot be paid using school nutrition program funds.

The following guidance must be used when using the IFB method.

- **Aggregate.** The aggregate total amount for an IFB is the total amount of the cost for a single contract (or a single renewed contract). The total cost for IFB contracts is typically broken into multiple invoices which are paid when specified expectations are met.
- **Award.** The award for an IFB will be made in writing to the lowest responsible and responsive offeror.
- **Competitive Purchasing.** Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible⁴⁵ offerors that respond to the solicitation for a firm fixed-price contract.
- **Contract.** An IFB will result in a firm fixed-price contract award.
- **Cost Analysis.** When using the IFB method, a formal cost analysis or price comparison as described in the CEs written procurement procedures is required.⁴⁶
- **Credits, Discounts, and Rebates.** In a firm fixed-price contract, the winning contractor is not required to return credits, discounts, and rebates to the SNP as the contractor factors them into the fixed price for the contract period.
- **USDA Food Values.** In a firm fixed-price contract, the winning contractor must ensure that the value of USDA Foods is returned to the SNP.
- **Evaluation of the Offers.** When the sealed bids are opened, the CE must use the rubric or scoring tool that was provided in the solicitation to determine whether an offeror is both responsible and responsive.⁴⁷
- **Opening Sealed Bids.** State and federal regulations mandate that the offers be opened publicly so that possible contractors and other interested parties are able to attend. The CE must provide a description of where and when the sealed bids will be opened. USDA recommends that at least two CE employees be present when sealed bids are opened. These employees should be directly involved with the procurement process (i.e., representatives from the School Nutrition Programs and/or from the purchasing department). School board members are not required to be present unless mandated by local policy

⁴⁵ Able to provide the product(s) and/or service(s) as described in the solicitation.

⁴⁶ See the *Cost Analysis* and *Forecasting* subtopics in the *Written Procurement Procedures* subsection in this section for additional information on this topic.

⁴⁷ Offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).

- If the specifications and/or technical requirements for the solicitation are complicated and the CE is not able to quickly and clearly determine which bid is most responsible and responsive, the CE may choose to announce which offers meet the criteria to be considered for an award at the bid opening and announce the actual award at a later date. If this is the case, the CE must clearly describe this process in its solicitation. This includes the time and place when the contract award will be announced.
- **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost plus percentage of cost. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
- **Public Advertising.** The invitation for offers must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time for potential offerors to respond.⁴⁸ The IFB must be publically advertised in such a way as to ensure there is full and open competition.⁴⁹

For Example: Publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically. Potential contractors often check major newspapers for notification on solicitations but would not check a regional paper.

- **Rejecting an Offer.** Any or all offers may be rejected if there is a sound documented reason.
- **Securing Sealed Bids.** As each sealed bid arrives, the bid should be date stamped and stored in a secured place until the time of bid opening.
For Example: Locked file cabinet, locked metal box, or any other tamper-proof location.
- **Solicitation.** The CE must provide the following information in the solicitation related to contract management:⁵⁰
 - Specifications and/or technical requirements for the product(s) and/or service(s) to be purchased
 - Bonding requirements if applicable
 - Method for submitting an offer
 - Method and criteria for evaluating the bid
 - Process for assigned staff to respond to and resolve all bid protests.⁵¹

⁴⁸ See the *Solicitation* subsection in this section for additional information on this topic.

⁴⁹ See the *Full and Open Competition* subsection in this section for additional information on this topic.

⁵⁰ See the *Solicitation, Procurement Purchasing Methods, Other Regulatory Contract Requirements, Awarding the Contract, and Contracts* subsections in this section for additional information on these topics.

⁵¹ See the *Protests* subsection in this section for additional information on this topic.

- Contractual statements required by law
- Method for submitting a protest for the bid award

The CE must maintain documentation that demonstrates the CE's actions to release the IFB to the public as well as all communication that occurs after the bid is released.

[NOTE: If the CE answers a question from an offeror, there has to be a method for the CE to share this information with all potential offerors. CEs commonly post this information on their websites.]

Request for Competitive Proposals (RFP)

An RFP is a competitive procurement method that includes specifications and/or technical requirements of product(s) and/or service(s) to be provided under a fixed price (fee) in a cost reimbursable or firm fixed-price contract where offerors submit a detailed offer for providing the products and/or services. An RFP is an ideal procurement method to use when a sealed bid method is not appropriate.

An RFP contract is awarded to the most responsible and responsive⁵² offeror whose offer is most advantageous to the program—price and other factors are considered. The following guidance must be used when using the RFP method.

- **Aggregate.** The aggregate total for an RFP is the total amount of the cost for a single contract (or a single renewed contract). The total cost for an RFP contract is typically broken into multiple invoices which are paid when specified expectations are met.
- **Award.** An RFP should be made in writing to the most responsible and responsive offer.
- **Competitive Purchasing.** Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible⁵³ offerors that respond to the solicitation for a contract resulting from an RFP.
- **Contract.** An RFP may be used for a firm fixed-price contract or a cost reimbursable contract.
- **Cost Analysis.** When using the RFP method, a formal cost analysis or price comparison is required as is described in the CE's written procurement procedure.
- **Credits, Discounts, and Rebates.** In a firm fixed-price contract, the winning contractor is not required to return credits, discounts, and

⁵² Responsible is defined as *able to provide the product(s) and/or service(s) as described in the solicitation*. Responsive is defined as an *offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s)*.

⁵³ Able to provide the product(s) and/or service(s) as described in the solicitation.

rebates to the SNP as the contractor factors them into the fixed price for the contract period. However, in a cost reimbursable contract, the winning contractor is required to return credits, discounts, and rebates must be addressed to the SNP.

- **USDA Food Values.** In a firm fixed-price contract, the winning contractor must ensure that the value of USDA Foods is returned to the SNP.
- **Evaluation of the Offers.** The CE must use the rubric or scoring tool that was provided in the solicitation to determine whether an offer is both responsible and responsive.
- **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost plus percentage of cost.
- **Public Advertising.** The request for proposals (RFP) must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time for potential offerors to respond.⁵⁴ The RFP must be publically advertised in such a way as to ensure there is full and open competition.⁵⁵

For Example: Publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically. Potential contractors often check major newspapers for notification on solicitations but would not check a regional paper.
- **Rejecting an Offer.** Any or all offers may be rejected if there is a sound documented reason.
- **Solicitation.** The CE must provide the following information in the solicitation related to contract management:⁵⁶
 - Specifications and/or technical requirements for the product(s) and/or service(s) to be purchased
 - Bonding requirements if applicable
 - Method for submitting an offer
 - Method and criteria for evaluating the bid
 - Process for assigned staff to respond to and resolve all bid protests.⁵⁷
 - Contractual statements required by law
 - Method for submitting a protest for the bid award

⁵⁴ See the *Cost Analysis and Forecasting* subtopics in the *Written Procurement Procedures* subsection and the *Public Advertising* topic in the *Solicitation* subsection in this section for additional information on these topics.

⁵⁵ See the *Full and Open Competition* subsection in this section for additional information on this topic.

⁵⁶ See the *Solicitation, Procurement Purchasing Methods, Other Regulatory Contract Requirements, Awarding the Contract, and Contracts* subsections in this section for additional information on these topics.

⁵⁷ See the *Protests* subsection in this section for additional information on this topic.

The CE must maintain documentation that demonstrates the CE's actions to release the RFP to the public as well as all communication that occurs after the solicitation is released.

[NOTE: If the CE answers individual offeror questions about the solicitation, the CE must have a method to share all questions and answers with all potential offerors. CEs commonly post this information to their websites and/or the Electronic State Business Daily (ESBD).]

Noncompetitive Method

A noncompetitive purchase method occurs when only one offer is received. Procurement by a noncompetitive method is an appropriate method of procurement when one or more of the following types of circumstances apply:

- ***Inadequate Competition.*** After the CE actively and appropriately attempted to solicit offers from a number of sources, competition is deemed inadequate—that is, the number of offers that met the solicitation specifications and technical requirements (i.e., responsible and responsive offers) were less than expected. This would include when a CE receives only one responsible and responsive offer.
- ***Sole Source.*** The product and/or service is available only from a single (sole) source distributor, supplier, or manufacturer.⁵⁸ Sole source noncompetitive procurement requires TDA approval.
- ***Public Emergency or Unexpected Emergency Situation.*** A public emergency (exigency) or unexpected emergency situation⁵⁹ will not permit a delay resulting from the additional time required for a competitive solicitation for the product and/or service. Emergency noncompetitive procurement requires TDA approval.
- ***TDA Authorization in Special Situations.*** TDA authorizes the CE's use of a noncompetitive procurement method. These cases are rare. TDA will notify a CE when this type of noncompetitive procurement is appropriate.

When a CE uses any noncompetitive method of procurement, the CE must retain all related documentation onsite to demonstrate compliance.⁶⁰ If a CE enters into a noncompetitive contract without TDA approval, the contract has been improperly procured. All costs associated with an improperly procured contract are unallowable, including any ongoing and maintenance costs, from the nonprofit food service account.⁶¹

⁵⁸ See the *Sole Source Method* subtopic that follows this subsection.

⁵⁹ An unexpected emergency situation might include the failure of the refrigeration system causing products on hand to spoil and need immediate replacement or a supplier cancelling a contracted delivery without adequate notice or a Presidentially declared disaster.

⁶⁰ See the *Records Retention* subsection in this section for additional information on records retention requirements.

⁶¹ See the *Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition* page located after the table of contents for information on how to contact TDA.

Noncompetitive Type—Inadequate Competition

When there is inadequate competition (i.e., the CE receives fewer offers than expected), the CE must take the following actions:

1. Determine if the CE took action to promote competition.
 - Were the specifications and/or technical requirements too restrictive? This includes solicitation or contract deadline for submitting an offer and schedule for delivery of products and/or services.
 - Did the public advertising strategy target a large enough circulation area to ensure that notice was provided to an adequate number of suppliers?
 - Was there any action taken by staff or suppliers that improperly limited competition?
2. Review the solicitation process to ensure that the solicitation did not limit competition.

[NOTE: When a CE receives an inadequate number of offers for a solicitation, it is often a result of the following conditions:

 - *Nonresponsive or overly restrictive specifications and/or technical requirements*
 - *Inadequate number of suppliers located in the area where public advertising occurred*
 - *Improper market allocation schemes by suppliers]*

The CE does not need TDA approval to award a noncompetitive bid when there are a limited number of offers as long as documentation demonstrates that the CE did not limit competition. Documentation for these purposes would include, but is not limited to, copies of advertising releases, mailing lists, communication documents, or contact logs.

Noncompetitive Type—Public Emergency or Unexpected Emergency Situation

To request approval to use a noncompetitive method during an emergency, the CE must submit a request to TDA in writing (paper, fax, or email).⁶² In cases of extreme emergency, a CE may call TDA directly to alert TDA about the situation. The request must still be submitted in writing, but a phone call will raise TDA's awareness of the need for an expedited response. In its written request, the CE must include the following information:

- Description of the emergency situation
- Products and/or services to be procured
- Supplier, distributor, or manufacturer from whom the product and/or services will be procured
- Period of time the CE plans to use the noncompetitive method for the emergency

TDA will provide written notification of approval or disapproval.

⁶² See the *Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition* page which follows the table of contents for contact information for each program.

Noncompetitive Type—Sole Source

The sole source method of procurement is used when there is only one supplier, distributor, or manufacturer for the product(s) and/or services(s) that are being procured.

Identification of Sole Source Products and/or Services

Before offering a sole source noncompetitive contract, a CE must verify that the product and/or service can only be procured from a single source. A procurement where there is only one offer is not necessarily sole source. There may be other suppliers, distributors, or manufacturers that could have submitted an offer but chose not to submit an offer.

For Example: There are 3 companies that commonly provide the type of cooling equipment that a CE is attempting to procure. Company A chooses not to bid because it is unable to meet the delivery timeline. Company B no longer distributes the line of products that would have met the specifications and technical requirements. Therefore, Company C is the only offeror. In this situation, the single offer submitted is not sole source. Instead, it is an inadequate competitive response to the solicitation. The CE must follow the guidance for that type of noncompetitive procurement.

For a sole source method to be used, there must be only one possible source for the product and/or service.

How does the CE determine the product and/or service is sole source?

1. A CE cannot accept a statement from the supplier, distributor, or manufacturer as verification that the product and/or service is only available from a single source.
2. The CE must actively attempt to solicit offers from other suppliers, distributors, or manufacturers.
3. If the product and/or service is available from other sources, but one source offers a feature(s) that other sources do not offer, the special feature cannot become the only factor that defines a product and/or service as the sole source unless the CE can document why this feature is required, not just preferred.
4. The CE must retain records that demonstrate its efforts to solicit offers for the product and/or service from other suppliers, distributors, or manufacturers.

Approval to Use a Sole Source Procurement Method

To request approval to use a sole source contract, the CE must submit a request to TDA in writing (paper, fax, or email)⁶³ which includes the following:

- Description of the CE's review of the solicitation, advertising, and other actions to determine if the contract was competitively solicited
- Description of the CE's actions to ensure that the supplier, distributor, or manufacturer is sole source
- Copies of the CE's solicitation, advertising, and other relevant documentation that demonstrate that the supplier, distributor, or manufacturer is a sole source.⁶⁴

TDA will provide written notification of approval or disapproval.⁶⁵

Brand Name Sole Source Purchase

When there is a compelling need, such as compatibility with current equipment, to purchase a specific brand product and/or service, the CE must have documentation that demonstrates that other available brands are not compatible with the CE's

1. current equipment,
2. replacement part inventory, and
3. maintenance staff's expertise.

However, even if the CE meets the brand name sole source purchase criteria listed above, it must still determine if there is more than one supplier for the brand of equipment or the services. If there are multiple suppliers, the CE must follow normal procurement processes in awarding a contract.

[NOTE: In some cases, suppliers for specific brands may be affiliated or associated suppliers which may result in collaboration among the suppliers and may restrict competition. CEs will need to address this as appropriate to ensure full and open competition.]

⁶³ See the *Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition* page which follows the table of contents for contact information for each program.

⁶⁴ See the *Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition* page which follows the table of contents for contact information for each program.

⁶⁵ See the *Records Retention* subsection in this section for additional information on records retention.

Buy American

The Buy American provision requires schools to purchase domestically grown and processed food to the maximum extent practicable. For a food product to meet the Buy American requirement, over 51% of the final processed food product must consist of agricultural commodities that were grown domestically (sometimes, referred to as processed *substantially* using domestic agricultural commodities).

[NOTE: Domestic food products include food products from the United States territories: Guam, American Samoa, Virgin Island, Puerto Rico, and the Northern Marian Islands.]

The Buy American provision applies to all purchases made with SNP funds. Purchases made in accordance with the Buy American provision must follow the applicable procurement regulations calling for full and open competition.⁶⁶

CEs must include this requirement in their contracts, requests for offers, and purchase orders with all potential contractors.

Third Party

Any entity or third party that purchases food or food products on behalf of the CE must

1. follow the same Buy American provisions that the CE is required to follow and
2. provide the CE with all documentation the CE requires to demonstrate that purchases are compliant with the Buy American provision.

Considerations for a Buy American Exception

The CE—not the distributor, supplier, or vendor—must determine that the use of a non-United States (US) or non-domestic food product is acceptable.

The purchase of a non-domestic food product should be an occasional not frequent occurrence. Each time a non-domestic food product is purchased or delivered, the CE must determine if the Buy American requirements are met.

For Example: If there is an occurrence in January, the CE must reevaluate the situation and determine if the factors that allowed the non-domestic product to be purchased still exists in March.

If the distributor, supplier, or vendor is repetitively unable to provide US or domestic food products, the CE should discuss the Buy American requirements with the distributor, supplier, or vendor and determine if the entity is capable of fulfilling the terms and conditions of the contract.

⁶⁶ See the *Competition* subsection in this section for additional information on this topic.

In the following situations, a CE may purchase food products that are an exception to the Buy American provision:

- The food product is not produced in sufficient quantities of a satisfactory quality.
- Competitive offers reveal that the cost of a domestic food product is significantly higher than the non-domestic food product.

The CE must first determine if the food product is grown in the US or not—a domestic food product or a non-domestic product:

Is the food product grown in the US or does 51% of the final processed food product consist of agricultural commodities that were grown domestically (in the US)?	<u>If yes</u> , the Buy American requirement is met.
	<u>If no</u> , the CE must determine if the food product is eligible for an exception to the Buy American provision.

The CE must first determine if the CE (or the distributor, supplier, or vendor purchasing on behalf of the CE) is able to purchase a domestically grown food product in large enough quantities of a satisfactory quality so that it is not necessary to purchase a non-domestic food product.⁶⁷ The following questions will assist CEs in making this determination:

1. Are there other sources for purchasing a domestic food product instead of a non-domestic product?	If the answer to <u>any one</u> of these questions is yes, the food product <u>does not qualify</u> for an exception to the Buy American provision.
2. Is there another domestic food product that can be easily substituted for the non-domestic food product?	
3. Is the price difference between the domestic product and non-domestic product reasonable in light of the CE's anticipated per meal price?	If the answer to <u>all</u> of the questions is no, the CE <u>may purchase</u> a non-domestic food product instead of a domestic food product.

If the CE purchases non-domestic food products, it must maintain documentation demonstrating the situation that warrants an exception. TDA has developed the *Buy American Checklist for Non-Domestic Food Product Purchases* to assist CEs in maintaining documentation. This form is available at www.squaremeals.org.

⁶⁷ See the directions for additional information about availability of domestic food products by using the USDA Marketing Resource Center.

Local Preference

CEs may⁶⁸ give preference or bonus points to local producers when soliciting and awarding contracts for the purchase of unprocessed locally grown or raised agricultural products as long as the preference or bonus points do not restrict full and open competition.⁶⁹ The CE must include its method or methods of using local preference in its written procurement procedures.

Locally Grown and Raised Agricultural Products Chart

Locally grown and raised foods commonly include, but are not limited to, the following:

- Beans
- Condiments
- Eggs
- Fish (with no additives or fillers)
- Fruits
- Grains and flour
- Herbs
- Meat (with no additives or fillers)
- Milk (unflavored fluid milk, but not flavored milk or any processed dairy products such as yogurt or cheese)
- Poultry
- Vegetables

Unprocessed locally grown or raised agricultural products mean those agricultural products that retain their inherent character. The following methods are appropriate handling and preservation techniques for locally grown or raised agricultural products:

- Addition of ascorbic acid or other preservatives to prevent oxidation of produce
- Butchering livestock and poultry
- Cleaning fish
- Cooling
- Drying/ dehydration
- Forming ground products into patties without any additives or fillers
- Freezing
- Packaging (such as placing eggs in cartons) Pasteurization of milk
- Refrigerating
- Size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding
- Vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package)
- Washing

⁶⁸ USDA regulation specifically gives the local entity the choice to use local preference for locally grown or raised products procured with school nutrition program funds or not to apply a local preference for these products.

⁶⁹ See the *Full and Open Competition* subsection in this section for additional information on this topic.

Defining Local

USDA regulations give the local entity the authority to define local as long as the definition does not restrict full and open competition.⁷⁰ For procurement, the CE may define its local geographic areas as areas located within a specified number of miles or within a geographic boundary (county, state, or multi-state). It may use different geographic areas for different types of products and for different seasons.

For Example: A CE is located in the middle of the state and had defined two local geographic areas.

Local Geographic Area 1: Local products readily found with a 100 mile radius of the CE—This local area will be used for herbs, tomatoes, lettuce, potatoes, carrots, and green peppers.

Local Geographic Area 2: Local products readily available in the state, but not readily available within a 100 mile radius of the CE—This local area will be used for peaches, broccoli, and melons.

Information Box 2

Questions to Consider When Defining Local

- What product(s) does the SNP want to source first, and where can they be found?
- Are there products the SNP is already sourcing from nearby areas?
- What is the SNP’s vision for local buying program and what types of producers can support that vision?
- How quickly does the SNP want add local products to the menu?
- Does the SNP want to couple local purchases with farm visits and educational activities with producers and suppliers?

⁷⁰ A state agency must not mandate a definition and must not prohibit the use of a local entity’s definition for *local* for the purposes of procurement for the SNP unless the CE’s definition restricts full and open competition.

Local Procurement Preference or Bonus Points

CEs may apply a variety of types of preferences or bonus points methods as long as the methods do not limit full and open competition.⁷¹ CEs must describe all methods to be used in their written procurement procedures.

Preference or Bonus Point Method Example Chart	
<i>Method of giving local preference include, but are not limited to, to the following examples:</i>	
<p>Preference Applied to Price</p> <p>A CE may apply the preference to the product price for local producers located with a specified radius of the CE.</p> <p><i>In its written procurement procedure, the CE states that it will give preference to local producers by subtracting a set amount from the bid price of local producers that are located within 100 miles of the CE.</i></p> <p><i>For Example:</i> <i>When procuring fresh fruit by the pound, the CE reduces the product price by \$0.10 a pound for local producers located within 100 miles of the CE.</i></p>	<p>Preference Applied to Evaluation Points</p> <p>A CE may use a tiered approach to awarding preference points for local products.</p> <p><i>In its written procurement procedure, the CE describes how it will use a tiered approach to giving local preference.</i></p> <p><i>For Example:</i> <i>For products that are readily available within a 100 mile radius of the CE, the CE will give</i></p> <ul style="list-style-type: none"> <i>– 10 points for a vendor located within 20 miles,</i> <i>– 7 points for a vendor located within 50 miles, and</i> <i>– 5 points for a vendor located within 100 miles.</i> <p><i>For products that are not readily available within a 100 mile radius of the CE, the CE will give</i></p> <ul style="list-style-type: none"> <i>– 10 bonus points for vendors located within the state and</i> <i>– 5 bonus points for vendors located out of state.</i>

Local Preference in the Solicitation and Contract Award

If a CE gives preference or bonus points for local producers, the CE must describe the way the local preference or bonus points will be used in its written procedures and provide this information in the solicitation.

[NOTE: While a CE may give preference or bonus points to local contractors, local cannot be listed as a specification or technical requirement on the solicitation. If local was designated as a specification or technical requirement, the exclusion of all non-locally grown agricultural products would restrict full and open competition.]

A CE must not award a contract based solely on local preference.

- **For an IFB**, if all points are equal for a local and a non-local producer based on the evaluation criteria, the CE must award the contract based on the most cost effective use of federal funds.
- **For an RFP**, the CE must award the contract with primary consideration⁷² given to the cost of the product but must also apply all other evaluation criteria in determining the most cost effective use of federal funds.

⁷¹ See the *Full and Open Competition* subsection in this section for additional information on this topic.

Other Local Preference Regulations

In the case of local preference, there are differences in the federal and state regulations as they apply to entities that are required to comply with the Texas Education Code (TEC).

- TEC requires (1) that school districts and charter schools define local preference as geographically within the state of Texas and (2) that a contract must be awarded to a local supplier over a non-local supplier if both meet the terms and conditions described in the solicitation.
- USDA regulations state (1) that SNPs have the authority to apply local preference in a variety of ways as long as the end result is the most cost effective use of federal funds or not use local preference in procurement and (2) that a contract cannot automatically be awarded to a local supplier over a non-local supplier if both meet the terms and conditions described in the solicitation.

Information Box 3			
Local Preference or Bonus Points Example			
The CE reduces the offer price by \$0.10 if the supplier meets the local preference criteria.			
	Supplier Price	Meets Geographic Preference?	Price with Preference Points
Supplier 1	\$1.97	No	\$1.97
Supplier 2	\$2.10	Yes	\$2.00
Supplier 3	\$2.03	No	\$2.03

If the award is an IFB with firm fixed price, Supplier 1 is awarded the contract.

If the award is an RFP, the SNP will evaluate all criteria, including primary consideration for cost, and then make the award. Because there are additional criteria for determining this award, it is possible that the supplier with the lowest cost price may not be awarded the contract.

The school district or charter school must use procurement practices that are compliant with TEC regulations when procuring products and/or services for educational purposes; however, when the CE is making purchases for the school nutrition program, the CE's procurement actions must be in compliance with USDA regulations.

For Example: An SNP, located on the border of Texas and New Mexico, issues a solicitation for fresh melons and applies bonus points for potential producers located within 90 miles. Two offers receive the same high score on the evaluation.

- One from a Texas farm 60 miles away
- One from a New Mexico farm 5 miles away

If this contract fell under TEC regulations, the contract must be given to the Texas farm.

However, because this purchase will be paid from school nutrition program funds, USDA regulations allow the SNP to define local to include farms located in New Mexico. In this case, the CE may award the contract to the New Mexico farm if it is the most cost effective use of federal funds.

⁷² See the *Awarding the Contract* subsection in this section for additional information on primary consideration.

Other Regulatory Contract Requirements

When federal funds are used, CEs must include specific regulatory and legislative provisions in all contracts. This subsection provides general explanations of what is required.

For these requirements, the term, contract, applies to both legal contracts and operational agreements and applies to CEs and third-party entities acting on behalf of CEs.

BYRD, Anti-Lobbying

(31 U.S.C 1352)

Applies to contracts exceeding \$100,000 using federal funds; requires contractor to complete specific forms related to lobbying (influencing or attempting to influence) in connection with obtaining a contract.

Civil Rights/Discrimination

Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 CFR Parts 15, 15a, and 15b; the Americans with Disabilities Act; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement – Nutrition Programs and Activities

Applies to contracts using federal funds; prohibits the discrimination to all eligible program participants on a basis of age, color, disability, national origin, race, and gender.

Clean Air and Water Act and Federal Water Pollution Control Act

Clean Water Act, 42 U.S.C. 7401-7671q; Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387); and Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15)

Applies to contracts exceeding \$150,000 using federal funds; requires compliance with all applicable standards, orders, and regulations; prohibits the award of contracts to contractors that are in violation of Clean Air Act. Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

Contract Work Hours and Safety Standards Act

40 U.S.C. 327-330 Sections 103 and 107 as supplemented by Department of Labor regulations (29 CFR Part 5)

Applies to contracts that involve mechanics or laborers exceeding \$100,000 using federal funds; establishes standards for hourly and salaried employees related to workweek and overtime.

Copeland Anti-Kickback Act

(18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3)

Applies to construction contracts using federal funds; prohibits a contractor or subcontractor from inducing kickbacks from employees.

Davis-Bacon Act

40 U.S.C. 276a to 276a-7 as supplemented by Department of Labor regulations (29 CFR Part 5)

Applies to construction contracts exceeding \$2,000 using federal funds; requires contractors and subcontracts to include actual wage determinations in bid specifications and contracts.

Energy Policy and Conservation Act

Public Law 94-163, 89 Statute 871

Applies to contracts using federal funds; establishes standards for the promotion of energy and water conservation methods when feasibly obtainable.

Equal Employment Opportunity

41 CFR, Chapter 60. Executive Order 11246 of September 24, 1965, entitled Equal Employment Opportunity, as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR Chapter 60)

Applies to construction contracts using federal funds; prohibits hiring practices that do not provide an equal opportunity of all persons without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

Health and Safety Certifications, Licensing, or Regulations

Local, state, or federal health and safety certifications, licensing, or regulations

Applies to contracts using federal funds; requires all contractors to meet applicable local, state, and federal health and safety certifications, licensing, or regulations which include, but are not limited, to facility use, food establishment, and authorized providers.

Rights to Inventions (Patent Rights, Copyright and Rights)

Pertaining to patent rights, copyright and rights in data

Applies to contracts using federal funds; requires all contractors to observe all applicable patent rights, copyright, and rights laws in operating the program.

Solid Waste Disposal Act

Section 6002 as amended by the Resource Conservation and Recovery Act

Applies to contracts exceeding \$10,000 using federal funds; requires contractors to maximize energy and resource recovery by using recycled materials and/or recycling waste products when reasonable, cost appropriate, and available.⁷³

[NOTE: The CE needs to determine what kinds of purchases and/or services are required to meet this provision. The CE should consider what is reasonable, cost appropriate, and available to the CE.]

Small and Minority Firms, Women’s Business Enterprise, and Labor Surplus Area Firms

Necessary affirmative steps to procure from minority firms, women’s business enterprises, and labor surplus area firms whenever possible

Applies to contracts using federal funds; requires contractors to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises whenever to the maximum extent possible.

Solicitation

A solicitation⁷⁴ is prepared by the CE to describe the products and/or services the CE wants to acquire. Regulations specify that the solicitation must clearly define the items or services needed in order for the offerors to properly respond to the solicitation. The solicitation is intended to level the playing field so that all offerors have an equal opportunity to compete for the award of the contract.

[NOTE: Although every aspect of the procurement process is important, if the solicitation is poorly prepared, the offers submitted will match the poor quality of the solicitation.]

Solicitation for Small Purchases

When products and/or services are procured through a small purchase method, the solicitation may take many forms because quotes for a small purchase may be accomplished by phone, email, or other method. To maintain accurate records, the CE’s written procurement procedure should clearly describe how the CE will document solicitations for small purchases.

At a minimum, the CE must keep a record of contact information for all potential contractors that the CE contacted or attempted to contact, specifications and/or technical

⁷³ The following websites provide additional information on possible waste management actions to meet this requirement: Environmental Protection Agency at <https://www3.epa.gov/wastes/conserve/tools/cpg/products/index.htm>; USDA, Biopreferred at <http://www.biopreferred.gov/BioPreferred/faces/pages/ProductCategories.xhtml>.

⁷⁴ Micro-purchases do not require a solicitation.

requirements provided to the potential contractors, offers or pricing information received, the method for determining the award, and the recipient of an award.

TDA has developed a sample form that may assist CEs with retaining this documentation. See the *TDA Resources* subsection of this section for additional information on this form and others TDA has developed to assist CEs with procurement.

Solicitation, IFB or RFP

When products and/or services are procured through either formal procurement method (IFB or RFP), the solicitation takes the form of documentation that describes the specifications and/or technical requirements for the products and/or services, the method and criteria for evaluation of responses, a process and schedule for submitting an offer, and the form of contract with standard terms. The standard terms are also called the *terms and conditions*. To maintain accurate records, the CE's written procurement procedure should clearly describe how the CE will develop and retain the solicitation document prepared for IFBs and RFPs.

The following issues must be addressed in a solicitation document for an IFB or RFP and, if applicable, to a small purchase.

Adjustment or Escalation Clause

If the fixed price is linked to an independent wholesale index, the index must be named and the frequency of the adjustment must be indicated.

Bonding Requirement

The solicitation must provide a description of the applicable bonding requirement if any, included in the solicitation.⁷⁵

Contract Award Type

The solicitation must provide information to the offerors on the possible ways the CE may award the contract—one award to one offeror or multiple awards to different offerors by category group or line item. The CE should consider the following issues in making this decision:

- Will awarding one contract for the total purchase result in a cost savings?
- Will awarding one contract for the total purchase encourage more potential contractors to submit offers?

⁷⁵ See the *Bonding Requirement* subtopic in the *Other State and Federal Regulations Related to Contracts* subsection in this section for additional information on this topic.

- Will awarding one contract for the total purchase limit competition because fewer potential contractors are able to respond to the quantity or variety in the solicitation?
- What are the facility and staffing requirements for the contract awarded by total purchase or by multiple contracts?

Cost-Reimbursable Contract

The solicitation for a cost-reimbursable contract must include or address the following functions:

- Allowable costs (materials + direct labor hours) as defined in applicable regulation.
- In a cost-reimbursable contract cost plus a percentage of costs is unallowable. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
- Ceiling price that the contractor exceeds at its own risk.
- Method the contractor will use to identify and apply rebates, credits, and discounts and any USDA Foods values used by the contractor which at a minimum must occur yearly, but may occur more often.

A CE may include a right-to-audit provision in the solicitation (and contract) to ensure that it has routine access to the information necessary for the CE to verify that the CE has received accurate crediting for USDA Foods values and applicable credits, discounts, and rebates.

Credits, Discounts, and Rebates

USDA regulation requires that contractors provide sufficient information to permit the CE to determine if all rebates, credits, and discounts have been applied correctly in cost reimbursable contracts. The CE must include a statement of how and when this will be done in the solicitation. The CE may write an audit provision or a penalties clause into the solicitation if the contractor does not provide required information. Firm fixed-price solicitations do not need to include credits, discounts, and rebates.

Delivery

The solicitation must include the expectations for when and where products and/or services will be delivered. If deliveries are to be made to schools, a list of the schools and their addresses should be included so that the offeror may calculate transportation costs.

Drop Delivery

If the CE will accept a drop shipment, it must be clearly stated in the solicitation.

Duration of Contract

The solicitation must contain a description of the length of the contract and expected date of contract completion.

Equipment

If the offer includes the purchase or use of equipment, the CE must provide adequate information for potential contractors to respond appropriately to the following types of issues:

- Utility and space requirements
- Quality and features required
- Installation requirements
- Indication of whether the CE may retain the property and continue to make payments in accordance with an approved amortization schedule or return the property⁷⁶
- Other factors which may impact the cost of purchasing equipment

Estimating Quantities

The CE will use forecasting to determine the quantities of products and/or services to provide in the solicitation.⁷⁷

Evaluation of Offers

The solicitation must include the written criteria for evaluating the offer and the value for all criteria. It may include the actual evaluation rubric.

Evaluation Criteria for Bid Bonus Points

The solicitation must include an explanation when additional value or weight (bonus points or percentages) is assigned for any criteria, such as local preference.⁷⁸

A CE must not use bonus points to restrict full and open competition.⁷⁹

⁷⁶ Interest for payments for retained property is an unallowable cost.

⁷⁷ See the *Forecasting* subsection in this section for additional information on this topic.

⁷⁸ See the *Local Preference* topic in the *Other State and Federal Regulations* for additional information on using local preference. See also USDA's *Procuring local Foods for Child Nutrition Programs* available at www.fns.usda.gov/farmtoschool/procuring-local-foods.

⁷⁹ See the *Full and Open Competition* subsection in this section for additional information on this topic.

Firm Fixed-price Contract

A firm fixed-price contract may be awarded for an IFB or RFP. This type of contract is awarded to the lowest cost offer that addresses all the material terms and conditions (responsible and responsive)⁸⁰ of the solicitation. A solicitation document for a fixed-price contract must include the following items in the solicitation:

- Specified or stated price that is fixed for the duration of the contract.
- Maximum incentive for the contractor to control costs and perform with greatest efficiency.
- Least administrative burden on the contracting parties.

A CE may include an audit provision in the solicitation (and contract) to ensure that it has routine access to the information necessary for the CE to verify that the CE has received accurate crediting for USDA Foods. Credits, discounts, and rebates are included in the fixed-price and, therefore, do not need to be tracked in a fixed-price contract.

If the scope of work includes products which may be packaged in varied amounts, sizes, specifications, and technical requirements, the solicitation should include clear definition of packaging requirements.

Health and Safety

Those contracted to provide services to CEs may be required to adhere to local, state, or federal safety licensing or standards. The CE must identify any expectations related to health and safety in its solicitation documents..

Invoicing

USDA regulation requires that contractors provide sufficient information to permit the CE to identify allowable and unallowable costs. The method and requirements for invoicing must be provided in the solicitation.

Local Preference

A CE may give bonus points or percentages for local preference⁸¹ (as defined by the CE), but it cannot exclude a potential contractor that is not local from contract consideration. The solicitation must clearly

⁸⁰ Responsible is defined as *able to provide the product(s) and/or service(s) as described in the solicitation*. Responsive is defined as *an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s)*.

⁸¹ See the *Local Preference* subsection in this section for additional information on using local preference. See also USDA's *Procuring local Foods for Child Nutrition Programs* available at www.fns.usda.gov/farmtoschool/procuring-local-foods.

outline the value or weight for any preference criteria and the method in which the criteria will be evaluated.

Managing the Contract

The CE must describe expectations related to the management of the contract including, but not limited to, the following issues:

- Information required on invoicing
- Delivery procedures
- Complaint procedures
- Payment procedures and processes
- Monitoring use of adjustment or escalation clause to ensure that the cost index is applied as appropriate to increase or decrease amounts as prescribed by the contract
- Process for submission of bid protests⁸²
- Reporting requirements for credits, discounts, and rebates (may include audit requirements or penalties for not providing adequate information as required in the contract)

Market Basket

If the solicitation uses a market basket approach to encourage the submission of varied pricing options, the solicitation must include a finite list of products and/or services on the market basket list. Each product and/or service on the list must have (1) a description with the quantity to be purchased, (2) specifications and/or technical requirements for each product and/or service, and (3) a description of how each product and/or service will be awarded on the contract.

⁸² See the *Protests* subsection in this section for additional information on this topic.

Notification

The solicitation must contain information about the process for submitting an offer, including, but not limited to, the following:

- Date bidding opens and closes
- Location and method to submit an offer
- Method and criteria for evaluating the offer
- Information or announcements about winning and losing offers
- Procedure to protest an offer including contact information for the person handling protests and timeline for submitting
- Necessary attachments, including certifications, assurances, and sample contract terms and conditions, if any

CEs may provide additional notification of invitations for sealed bids (IFBs) or requests for competitive proposals (RFPs) through postings on the Texas Comptroller of Public Accounts bid database, Electronic State Business Daily (ESBD).⁸³ This database is available to all CEs classified as governmental entities. This database is widely available to various types of potential contractors across the state and offers a venue for notification that may reach potential contractors the CE may not know about.

Protests

The solicitation must contain information about the process for submitting a protest of the solicitation, cancellation of a solicitation or other request, contract award or proposed award of a contract, and termination of the contract.⁸⁴

Samples for Taste Testing

CEs may include samples for taste testing as a specification or technical requirement in a solicitation. However, the CE needs to ensure that the description of the specifications and technical requirements for taste testing clearly communicate the expectations.

The CE does need to consider if any product and/or services provided by a potential contractor will become an incentive to award a contract. Moreover, the CE should also remember that any samples provided by the potential contractor are not actually free. The offeror will include the costs for providing samples to the CE in its offer.

⁸³ Available at <http://esbd.cpa.state.tx.us/>.

⁸⁴ See the *Protests* subsection in this section for additional information on this topic.

Shared Purchasing

A CE may create a solicitation that combines the products and/or services for other school functions with an SNP products and/or services procurement when the following conditions apply: (1) if the additional items are included in the original solicitation specifications and/or technical requirements (including quantity) and (2) if the SNP recovers the full cost for the products and/or services. Recovered cost includes, but is not limited to, the actual cost of the product, handling, transportation, and labor. This may include a proportional share of the cost if applicable.

Opening of Offers

The CE must provide a description of where and when sealed bids will be opened.

Prequalified Lists

If the CE uses prequalified lists, the CE must ensure that all prequalified lists of persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. Although the prequalification of potential contractors results in an efficient procurement process, CEs must not preclude potential offerors from qualifying for the prequalification list during the solicitation period.

Procurement procedures which incorporate prequalified lists must never unduly restrict or eliminate full and open competition.

Qualitative Elements

There are products and/or services that are more difficult to describe in objective, concrete terms—qualitative elements. When including these types of elements in a solicitation, the CE will need to provide specific outcomes or expectations, examples, and evaluation criteria to ensure that the offeror has sufficient information to submit a responsive bid.

For Example: Point of service (POS) systems that are used to record meal type and prevent overt identification

Questions from Potential Contractors

Because information shared with one potential contractor must be shared with all potential contractors, the CE must include a description of the location and method the CE will use to share answers to questions or clarifications potential contractors ask about the solicitation.

Record Retention

The solicitation must include a description of all applicable records retention requirements for the awarded contractor.

Recourse

The solicitation must include an explanation of any remedies in favor of the CE if the contractor cannot or does not perform as required.

Services

If the solicitation includes services to be provided, the solicitation must include a clear explanation of the scope of the services, required certifications, or licenses for those performing the services.

Significant Event Dates

The solicitation must provide detailed information on the start, major events, and end dates for the contract which includes delivery dates or other significant dates.

Surplus Area Firms

The CE must include relevant information related to preferences or criteria to encourage the participation of small and minority businesses, women's business enterprises, and labor surplus area firms. This may include preference points in the offer evaluation. Efforts must include the following:

- Placing qualified small and minority businesses and women's business enterprises on solicitation lists.
- Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources.
- Dividing specifications and/or technical requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises.
- Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises.
- Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.
- Requiring the prime contractor, if subcontracts are allowed, to take the affirmative steps listed above.

Supplies

If the offer includes supplies to be provided, the solicitation must include a clear explanation of the size, quality, packaging, or other characteristics for supplies.

Specifications and/or Technical Requirements

The specifications and/or technical requirements provided in the solicitation give the offeror all the information needed to submit a competitive bid. This applies to both the purchase of products and/or services.

While this information must be specific, CEs must be careful to ensure they are not being so specific that they limit competition. However, to award a contract the CE must be able to determine if the offeror is responsible and responsive.⁸⁵ Therefore, the solicitation has to be written in such a way that the CE can determine which offeror is responsible and responsive and which ones are not.

For products, specifications and/or technical requirements include, but are not limited to, the following:

- Applicable nutrition standards
- Delivery expectations
- Basic features as well as size/weight/grade specifications and/or technical requirements
- Packaging requirements
- Quantity
- Warranty

For services, specifications and/or technical requirements include, but are not limited to, the following:

- Certifications or licensing requirements
- Description of duties to be performed
- Equipment provided by CE and expected to be provided by contractor
- Hours of work
- Performance expectations
- Required outcomes
- Warranty

Type of Contract

Specific identification of the type of contract to be awarded—fixed price or cost reimbursable.

⁸⁵ Responsible is defined as *able to provide the product(s) and/or service(s) as described in the solicitation*. Responsive is defined as *an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s)*.

Use of Brand Names

In addition to the specifications and technical requirements in the solicitation, a brand name or equal statement may be added to the description of a product to demonstrate the type of product the CE is attempting to purchase. However, a CE cannot stipulate that the only product that meets the specifications and technical requirements is a brand name product unless it is a sole source procurement as described in the *Noncompetitive Method* subsection in this section.

Methods for Issuing Solicitations for an Individual Item or List(s) of Items

There are multiple methods for issuing solicitations that a CE may use to obtain the most competitive pricing for an individual product and/or service or a list of products and/or services.

[NOTE: The CE should keep in mind that a vendor may have more than one responsive product that meets the specifications and/or technical requirements as described in a solicitation. In these cases, the CE will need to evaluate which responsive product to accept and award the full quantity/volume for that product as described in the solicitation.]

One Solicitation with a List of Items

The solicitation describes each item on a list by quantity, specifications, and technical requirements. The list could have two items or hundreds of items. The most responsible and responsive vendor is awarded the contract for every item on the list.

For Example: A CE issues a solicitation asking for an offer for 100 food items which includes specifications and/or technical requirements and the quantity of each item. After evaluating the offers, the CE awards the contract for the full quantity of each item on the list to one vendor.

One Solicitation with Groups of Items

The solicitation describes the quantity, specifications, and technical requirements for each item within a group and provides an explanation that the contract for each group of items may be awarded to different vendors. There may be two groups of items or 20 groups of items. For this type of solicitation, vendors will have the option to offer a price option for one, some, or all groups of items. The most responsible and responsive vendor for each group of items is awarded a contract. A vendor may be awarded the bid for more than one group of items, or each group of items may be awarded to a different vendor.

For Example: A CE issues a solicitation which includes the quantities, specifications, and technical requirements for two groups of listed items: Group 1 with 5 bread items and Group 2 with 7 serving items (trays, utensils). After evaluating the offers, the CE awards the contract for the full quantity of the bread items listed in Group 1 to Company A and a contract for the full quantity of serving items listed in Group 2 to Company B.

Multiple Solicitations for One Item or One List

Each solicitation describes the quantity, specifications, and technical requirements for an item or list of items. The most responsible and responsive vendor for each solicitation is awarded the contract. A vendor may be awarded multiple contracts or a single contract.

For Example: A CE issues 3 solicitation documents: (1) list of 12 condiment items which includes the quantity, specifications, and technical requirements for each item; (2) point of service software program with an explanation of specifications and/or technical requirements and needs; and (3) list of 5 types of milk which includes quantity, specifications, and technical requirements for each milk type. After evaluating each offer, the CE awards a contract for full quantity described in the solicitation to the most responsible and responsive offeror for each solicitation—in this case, 3 separate contracts.

One Solicitation for One Item with a Split Award by Percentage of Total Quantity

The solicitation describes the specifications and/or technical requirements for the item and provides an explanation that there will be multiple awards with each awardee being given a specific percentage of the total quantity for the item. The vendor has the option to offer a price option for one or more of the percentages of the total quantity. The most responsible and responsive vendor for each percentage for the item is awarded the contract. The number of awarded contracts is based on the percentages described in the solicitation.

For Example: A CE issues a solicitation for beef patties with a description that provides specifications and/or technical requirements and indicates that one award will be for 60% of the total quantity/volume, a second for 20%, and a third for 20%. After evaluating the offers, the CE awards three contracts—one for each percentage described in the solicitation—60% of total quantity/volume to Company A, 20% of total quantity/volume to Company B, and 20% of total quantity/volume to Company C.

Public Advertising

The solicitation must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time for potential offerors to respond. Typically, a sufficient amount of time is two weeks with notification being made at least twice during that period. However, CEs should check to see if there are public advertising requirements specified by the agency or organization that has regulatory authority (federal, state, or local) over the entity for all purchases. Moreover, in cases where the offer for an IFB or RFP is expected to be complicated or lengthy, CEs should expand the notification period in these cases.

Full and Open Competition

An IFB or sealed bid and an RFP must be publically advertised in such a way as to ensure that there is full and open competition.⁸⁶

Highest Possible Circulation

The choice of an advertising publication is expected to ensure that the announcement or notice of the solicitation has the highest possible circulation. Therefore, publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically. In addition to print publication, CEs should consider the value of using online publication of solicitation documents to reach wider audiences.⁸⁷

Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD)

All CEs classified as governmental entities may also post invitations for sealed bids (IFBs) or requests for competitive proposals (RFP) to the Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD).⁸⁸ This database is widely available to various types of suppliers across the state.

An advertisement of formal solicitations must contain the following information:

- Address and telephone number for location where any potential offeror may obtain the solicitation
- Bonding requirements, if applicable⁸⁹
- Date, time, and location of the opening of offers and awarding of contracts
- Deadline and method for submission
- General category, specification, or technical requirement for the item to be bid

[NOTE: A CE may choose to put detailed specifications and/or technical requirements on a website or in a separate document that is provided on request instead of including

⁸⁶ See the *Full and Open Competition* subsection in this section for additional information on this topic.

⁸⁷ The Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD) is an example of an online publication method of solicitation.

⁸⁸ Available at <http://esbd.cpa.state.tx.us>

⁸⁹ See the *Bonding Requirement* subtopic in the *Other State and Federal Regulations Related to Contracts* subsection in this section for additional information on this topic.

lengthy specifications and/or technical requirements in the public advertising. If the CE chooses to take this option, the CE must include the location and method to access the detailed specifications and/or technical requirements in the advertising announcement.]

- Indication of how the contract will be awarded
- Method and criteria for the evaluation of offers

[NOTE: A CE may choose to include a summary list of the method and criteria for evaluation in the advertisement instead of the full evaluation rubric. If the CE chooses to take this option, the CE must include the location and process to access the detailed information on the evaluation method and criteria in the advertising announcement.]

- Method of payment
- Name of the CE

Special Situations, Guidance Related to the Solicitation

The following guidance will provide additional clarification:

Approved Brands

CEs may specify a list of approved brands as part of a product description in addition to the specifications and technical requirements in order to demonstrate what types of products are acceptable.⁹⁰ In these cases, the CE must include the phrase *or equal* after each approved brand and indicate that any product that meets the same specification and technical requirement is acceptable.

Bread Specifications

If a bread item has a standard of identity, it is still necessary to specify the whole grain profile. The U.S. Food and Drug Administration (FDA) has standards of identity for non-enriched bread products as well as the whole grain-rich and enriched products.

Contract Documentation for Food Products

The CE must include a statement about the required documentation that demonstrates that food products, including commercially prepared products, meet the meal pattern or competitive food standards.⁹¹ CEs should be consistent in the information requested of potential contractors. Any processed food product that does not have a yield listed in the *Food Buying Guide for School*

⁹⁰ Many CEs test and approve brands that meet their standards and student preferences. The object of testing must not be to determine the best product on the market but rather to determine which products are of acceptable quality to meet the needs of the program. Product testing procedures must provide for an objective evaluation of tested products, and documentation of test results must be maintained on file with the CE.

⁹¹ See the *Administrator's Reference Manual, Section 8, Breakfast; Section 9, Lunch; Section 10, Afterschool Meal Programs; Section 20, Competitive Food Nutrition Standards; and Section 24, Child Nutrition (CN) Labeling and Product Documentation* for additional information on required food component contribution and competitive foods.

*Nutrition Programs*⁹² needs to either have (1) a CN label; (2) a signed and dated product formulation statement; or (3) depending on the product type and intended use, nutrition fact labels. The documentation must identify the contribution of the food product toward meeting the meal pattern requirements or the nutritional values required for the competitive food standards.

Flexibility for Growth

CEs may include the possibility for an increased amount of products and/or services as long as the increase is reasonable and is clearly outlined in the solicitation. Commonly, this type of option is used for an anticipated growth in student population and participation. To be reasonable, an increase based on student enrollment should correlate to the normal increase in enrollment for the CE. If the increase included in the solicitation is not reasonable, it is not an allowable flexibility.

Generic Terminology

When writing a specification or technical requirement for a product without specifying brand name, use a generic name or standard of identify that is usually listed under the trade name. A brief description of the product may also be included.

For Example: Generic names of breakfast cereals include the following:

- *Toasted oat cereal, donut-shaped*
- *Puffed wheat cereal, sugarcoated*
- *Cornflakes, sugarcoated*
- *Shredded wheat biscuits, small, sugarcoated*

Grade Specifications and/or Technical Requirements

By including grade specifications and/or technical requirements in the solicitation, the CE lets the offeror know that the products must meet or exceed the USDA grading requirements. USDA, Agricultural Marketing Service (AMS) has developed the *Understanding Food Qualities Labels* tip sheet to assist consumers in understanding the grade specifications and/or technical requirements.⁹³ When the grade specifications and/or technical requirements are omitted, the offer may be made using undesirable products. If a potential contractor offers an item that is only supplier grade, it is a nonresponsive or overly responsive bid.

Minimum Drained Weight

It is necessary to specify minimum drained weights in specifications and/or technical requirements for canned fruits and vegetables. This ensures the minimum acceptable amount of product per can.

⁹² Available at www.fns.usda.gov/tn/food-buying-guide-school-meal-programs

⁹³ Available at www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Factsheet.pdf

Procuring Fresh Fruit and Vegetables

While CEs are encouraged to take advantage of economies of scale⁹⁴ in order to get the best pricing, long-term contracts for fresh fruit and vegetables are not always available. In these cases, the CE needs to establish a purchasing schedule in its written procurement procedures that allows the CE to get the most cost effective pricing.

A fresh fruit and vegetable procurement schedule includes, but is not limited to, frequency of procurements and what products to purchase in each season.

[NOTE: A schedule of purchases not only helps the CE obtain the competitive pricing, it will also assist menu planners.]

Each time the CE purchases fresh fruit and vegetables, it must be procured correctly. The CE may use any type of procurement method or contract allowed for child nutrition programs.

Purchase Catalog

The use of a purchase catalog is allowable if the solicitation for the purchase catalog includes specifications and technical requirements that indicate what will be purchased and quantity to be purchased. However, TDA recommends that CEs seek additional guidance from their education service centers (ESCs) before issuing this type of solicitation. If the solicitation is not done correctly, the purchases may result in unallowable costs.⁹⁵

Single, Multiple, or Split Contract Awards

The CE may award a single, multiple, or split contracts. However, if the CE plans to award multiple or split contracts, it must describe how this will be done in the solicitation so that offerors are able to give their best prices based on this possibility. This includes an indication of quantity for each award which allows the offeror to provide a best price based on the economy of scale.

For Example: A solicitation states that 40% of a product quantity will be awarded to one company and 60% will be awarded to another. An offeror would then be able to quote a price for 40% and/or 60% of the total contract quantity.

Bonding Requirements

USDA has rescinded its previous guidance that bonds are required for all non-construction contracts in excess of \$50,000. Instead each CE must evaluate the products and/or services to be procured and determine if a bond is needed to safeguard any possible loss of funds.

[NOTE: Many contracts have financial guarantees. These guarantees may serve the same purpose as a bond.]

⁹⁴ Procuring large quantities of a product to get a better price.

⁹⁵ An unallowable cost or expense cannot be paid using school nutrition program funds.

Since contracting entities (CEs) across Texas are in various stages of procuring products and/or services for School Year (SY) 2016-2017, CEs will apply the following guidance for all procurements that have been initiated after May 5, 2016 and before June 1, 2016:

- **FSMC Contracts**— All FSMC contracts for SY 2016-2017, including renewals for the upcoming school year, are either approved or in the process of approval. Because the bonding requirement change is being implemented for future contracts, the SY 2016-2017 FSMC contracts will not be modified to remove bonding requirements.

For SY 2017-2018, the bonding requirements will be removed from the TDA RFP template. Beginning SY 2017-2018, CEs may also remove the bonding requirement in renewals as long as removing the bonding requirement does not cause a material change. If there is a material change, the contract must be competitively rebid. The CE may also renew the contract with the bonding requirement in place.

For SY 2017-2018, a CE issuing a new FSMC solicitation in SY 2017-2018 (1) may continue to include a bonding requirement as long as the bonding requirement does not limit competition or (2) may choose to issue the solicitation without a bonding requirement.

- **Non-FSMC Contracts, Solicitation Has Been Released, But the Contract Has Not Been Signed**— If the solicitation for SY 2016-2017 has been released and includes a bonding requirement, the CE may (1) complete the procurement process with a bonding requirement included in the solicitation and the resulting contract or (2) rescind or pull the solicitation and reissue the solicitation without the bonding requirements. CEs may want to consider if the bonding requirement prevents competition. If it does limit competition, reissuing the original solicitation without the bonding requirement may result in greater competition.
- **Non-FSMC Contracts, Procured Contract Has Been Signed**— If the CE has procured a contract for SY 2016-2017 which includes a bonding requirement, the CE may (1) allow the contract to continue as written with the bonding requirement or (2) terminate the contract if allowed by the terms and conditions of the contract and competitively rebid the contract without the bonding requirements.
- **All Construction Contracts**— All construction contracts in excess of the simplified purchasing threshold (exceeds \$50,000) are required to ensure that the federal financial interest is adequately protected by including the minimum bonding requirements in the solicitation and contract: (1) bid guarantee of 5 percent of the bid price, (2) performance bond of 100 percent of the contract price, and (3) payment bond of 100 percent of the contract price. However, if a CE determines that the federal financial interest is adequately protected without requiring the minimum bonding requirements as described in § 2 CFR 200.326,

the CE may request TDA to approve a different minimum security or bonding requirement. TDA will review the request in consultation with USDA.

For all new procurements initiated after June 1, 2016, CEs will use the following guidance:

- **All New Non-Construction Solicitations and Contracts from Here Forward**—If the CE determines a bonding requirement is needed and if the bonding requirement does not prevent competition, the CE may require a bond for the products and/or services being procured. See the *FSMC Contracts* information bullet topic above for additional guidance related to new FSMC contracts and renewals.
- **All Construction Contracts**—All construction contracts in excess of the simplified purchasing threshold (exceeds \$50,000) are required to ensure that the federal financial interest is adequately protected by including the minimum bonding requirements in the solicitation and contract: (1) bid guarantee of 5 percent of the bid price, (2) performance bond of 100 percent of the contract price, and (3) payment bond of 100 percent of the contract price. However, if a CE determines that the federal financial interest is adequately protected without requiring the minimum bonding requirements as described in § 2 CFR 200.326, the CE may request TDA to approve a different minimum security or bonding requirement. TDA will review the request in consultation with USDA.

When Bonds Are Used

If the CE determines a bond is necessary, the bonding requirements may be met through the use of a bid bond, certified check, or other negotiable instrument accompanying an offer as assurance that the offeror will, upon acceptance of the bid, execute such contractual documents as required within the time specified.

The CE must describe the bonding requirements in the solicitation and the bonding requirements must be included in the final contract.

When a Bid Guarantee (Bid Bond) is Used

The bid guarantee or bid bond is intended to cover the cost of rebidding and/or cost of operating without a contract if an offeror does not execute a contract with the CE after being awarded the contract. The offeror must include a bid guarantee with its offer. The CE will return all guarantees to the unsuccessful offerors when the contract is awarded and to the awarded contract as soon as the contract is signed.

When a Performance Bond Is Used

A performance bond covers the cost of ensuring that the products and/or services are provided as specified by the terms of the contract. If the contractor does not provide the products and/or services as described in the contract, the performance bond covers the following costs:

1. costs incurred for correcting problems,
2. costs associated with performing the services covered in the contract, and/or
3. cost associated with procuring a new contract.

Once the contract is awarded, the contractor must provide a performance bond for 100 percent of the contract price. This bond secures fulfillment of all the contractor's obligations under the contract as part of the contract deliverables.

When a Payment Bond Is Used

A payment bond covers the cost of materials and workers under subcontract. If the contractor fails to pay the supplier for products and services provided under the subcontract, the bond covers the cost of paying for those products and/or services.

When the contract is awarded, the contractor awarded the contract must provide a payment bond for 100 percent of the contract price which assures payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract as part of the contract deliverables.

Cooperative Purchasing

USDA released updated guidance in the fall of 2016 which supersedes previous guidance on cooperatives that purchase on the behalf of CEs. Therefore, CEs that have created procurement procedures and processes based on earlier guidance must update their procedures and processes to align to the updated guidance.

CEs may join or form cooperative purchasing groups that make purchases on behalf of their members. These cooperatives allow members to obtain better prices through economies of scale.⁹⁶ Cooperatives may be nonprofit or for-profit entities.

Purchases made by the cooperative must be made in accordance with USDA regulations for Child Nutrition Programs. If there are any conflicts with other federal or state regulations, the cooperative must apply the USDA regulations since the funds are sourced from one of the Child Nutrition Programs.

⁹⁶ By joining together and compiling their total number of purchases, CEs get a better discount based on the increased number of product purchases—an economy of scale.

In procurement regulations, there are two types of cooperatives: (1) Child Nutrition Program Operator⁹⁷-Only Cooperatives (Operator-Only Cooperatives) and (2) Third Party Cooperatives.⁹⁸

Child Nutrition Program (CNP) Operator-Only Cooperatives (Operator-Only Cooperatives)

Any type of agreement that is formed solely among CNP operators including regional education service center (ESC) cooperatives

Establishment of an Operator-Only Cooperative

This type of cooperative does not have to be procured. However, CEs must initiate the creation of these types of cooperatives or, in the case of the Texas ESCs, be established by state law and regulation to procure on behalf of specific entities—public school districts and charters. Membership in this type of cooperative cannot be solicited.

Fees for an Operator-Only Cooperative

Operator-only cooperative membership may include a fixed fee to cover the overhead or administrative costs as specified in the cooperative agreement.

Unanticipated Profits

Operator-only cooperatives are intended to help CEs make purchases that result in the most cost effective use of federal funds. Therefore, regulations include a requirement that unanticipated profits from cooperatives be returned to the CE.

For-Profit Cooperatives

At the end of the contract year, the cooperative must return all profit in excess of the profit margin as described in the contract to the participating CEs.

- If there is a membership fee, the contractor must distribute to the members any funds received over the profit margin as described in the contract to the members.
- If the CE is not charged a fee and the contractor's profit is derived from its transactions with other entities, the cooperative must distribute to the members any amounts received over the profit margin as described in the contract to the members.

⁹⁷ Operator in this section means *an entity that operates a Child Nutrition Program*

⁹⁸ USDA released updated guidance in *USDA Memo SP 05-2017, Q&A: Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third-Party Services* on October 19, 2016. This memo supersedes *USDA Memo SP 35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc.*

Nonprofit Cooperatives

At the end of the contract year, if there is a membership fee or charge for services provided, nonprofit cooperatives must return all funds in excess of cost of operating the cooperative to the CEs participating in the cooperative. TDA recommends that cooperatives include this process in their agreements.

Management of an Operator-Only Cooperative

Each CE is responsible for monitoring the performance of the cooperative. Written agreements which delineate the roles and responsibilities for all involved will help to ensure that proper procurement occurs. However, having an agreement that delineates roles and responsibilities does not release the CE from its responsibility for monitoring the performance of the cooperative.

Procurement by an Operator-Only Cooperative

All purchases made on behalf of the cooperative members must follow (1) all USDA procurement regulations and (2) State and local procurement requirements if more restrictive as long as these regulations are not in conflict with USDA regulations. While the cooperative is making the purchases on behalf of the member CEs, each CE is still responsible for retaining documentation that these purchases are compliant with all regulations.

- *Material Change:* Material change requirements apply to Operator-Only Cooperative procurements.

A change—increase or decrease—in cooperative membership may cause a material change. Therefore, Operator-Only Cooperative agreements must clearly describe the expected level of membership for each participant, including, but not limited to, adding members and cancelling membership.

- *Credits, Discounts, Rebates, and USDA Foods Values:* Operator-Only Cooperatives must provide members with all applicable credits, discounts and rebates and USDA Foods Values. In these cases, the cooperative must provide the CE with documentation that demonstrates compliance.

- *Operator-Only Cooperative Contracts with a Third Party Contractor:* If an Operator-Only Cooperative engages a third-party contractor or agent to manage or purchase products and/or services on behalf of the Operator-Only Cooperative, the third-party must be procured in a manner consistent with all USDA regulations and guidance. Any added purchases or services provided by a third-party that are not procured properly may create a material change.⁹⁹ Any products and/or services that are not procured properly may result in unallowable costs.¹⁰⁰
- *Price:* A price based on a cost plus percentage of cost is not allowed for any purchases made on behalf of CEs by an Operator-Only Cooperative. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
- *Vendor List for Products:* In specific circumstances, an Operator-Only Cooperative may award a bid to a group of approved produce vendors with the intention that each CE will order products and/or services through an *on demand* method or request. To be allowable, the solicitation must include specifications and/or technical requirements that establish reasonable total estimated cost and quantities (cost analysis and forecasting) of the products and/or services to be purchased. By describing the total cost and quantities in the solicitation, all potential offerors know what is being solicited and are able to give CEs the most cost effective pricing.

When a vendor list is used, the solicitation must also clearly state that a vendor list will be used and must describe how a vendor is approved to be on the list. When CEs use a vendor list, they must ensure that use of the list does not limit competition.

⁹⁹ See the *Material Change* topic located in the *Contracts* subsection in this section for additional information on this topic.

¹⁰⁰ An unallowable cost or expense cannot be paid using school nutrition program funds.

Third Party Cooperatives

Any type of cooperative agreement that is formed by sources that are external to CEs which includes the following types of cooperatives:

Non-Child Nutrition Program State Agency Procurement Agency Agreements

Intergovernmental agreements with the State which may include public, private, and nonprofit entities and are conducted for State facility needs using State procurement standards. These agreements allow local educational agencies and other Child Nutrition Program operators to purchase from the State's contracted sources. This type of cooperative includes, but is not limited to, state agency buy boards.

Interagency Agreements

Public, private, and nonprofit entities formed for the purpose of procuring goods and services. This includes, but is not limited to, county buying groups and education technology hubs.

Group Purchasing Organizations, Group Buying Organizations, and Third-Party Vendors (Collectively Referred to as GPOs)

CNP and non-CNP operators such as public and private schools, hospitals, universities, law enforcement, public works, etc., who join a third-party company or service provider. A GPO may be a for-profit or a nonprofit entity. Typically, a GPO includes a membership fee for those granted access to the GPO price list of products and services. This type of cooperative includes, but is not limited to, membership buy boards and subscription services.

Establishment of a Third Party Cooperative

This type of cooperative does not have to be procured by the CE. Instead, a CE is given the option to join or participate in order to gain access to a price list of products and/or services.

Fees for a Third Party Cooperative

CEs may pay a fee to cover overhead or administrative costs for third party cooperatives. These fees must be specified in the agreement. These fees do not constitute a competitive procurement. A cost plus percentage of cost fee is not allowable for any type of fee structure. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

Procurement for a Third Party Cooperative

The following types of procurement may occur through all types of third party cooperatives:

- *Micro-Purchase Method:* If the amount of the purchase is equal to or less than \$3,500, the product or service may be procured from a third party cooperative using a micro-purchase method as long as the micro-purchase requirements, as described in this section, are met. A membership fee that is equal to or less than \$3,500 can be a micro-purchase. It is the CE's responsibility to retain documentation that demonstrates the CE's compliance with the micro-purchase requirements.
- *Price:* Price must be the primary consideration for awarding a contract or making a purchase. A price based on a cost plus percentage of cost is not allowed for any purchases made on behalf of CEs by a Third Party Cooperative. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).
- *Small Purchase Method and Formal Procurement Method:* The third party entity's procurement practices determine how a CE may use a third party entity for purchasing.
 - If the CE is member of a third party cooperative that follows USDA procurement regulations for small and formal method purchases as described in this section, the CE may make purchases through the third party cooperative without additional procurement actions. It is the CE's responsibility to retain documentation that demonstrates that the third party cooperative follows USDA procurement regulations for products and/or services procured. The records may include, but are not limited to, the solicitation and contract, advertising documentation, and written procedures and processes.
 - If the third party cooperative does not follow USDA procurement regulations as described in this section, the CE may consider the price from the third party cooperative as one source of pricing for small and formal method purchases (i.e., a bid or an offer). In these cases, the CE must obtain additional competitive offers using a solicitation process as defined by the USDA procurement regulations described in this section.

After obtaining additional offers, the CE will evaluate the price from the third party entity and the additional offers. Then, the CE will purchase (or award the contract to) the most responsive and responsible offeror with price as the primary consideration.

It is the CE's responsibility to retain documentation that demonstrates the CE's compliance with the required procurement process.

Individual CE Purchases

Even if a CE joins a cooperative, the CE is not required to make all of its purchases through the cooperative—the CE may decide to purchase select products and/or services outside of the cooperative if it is in the best interests of the CE or program.

However, if the CE has agreed to purchase specific products and/or services through the cooperative, the CE cannot purchase these products and/or services from another source until the quantity or amount the CE agreed to purchase is exhausted.

Agent Contract

CEs may also procure an agent to make purchases on behalf of the CE. An agent is defined as

A person or business that is procured to act on behalf of the CNP operator to procure products and/or services

CEs must use the following guidance when they procure an agent to act on their behalf:

Establishing an Agent Contract

An agent must be properly procured following USDA procurement regulations in order for the agent to procure on behalf of the CE. The CE paying a fee does not constitute a solicitation or contract with an agent. Agents cannot be procured if they do not openly provide the full price per purchase unit for their service.

Fees for Agent Contract

Fees for an agent to procure on behalf of the CE must be fixed and based on purchase unit, volume, or cost. The fee cannot be a percentage of the cost.

Management of the Agent Contract

The solicitation and contract must require that the agent conduct all competitive procurement methods with the CE's interests solely in mind. To accomplish this requirement, the procurement agent must take the following actions at a minimum:

- work closely with the CE to understand the CE's needs;
- develop solicitations on the CE's behalf consistent with USDA regulations and applicable program regulations as required;
- award contracts only to responsive and responsible contractors whose bid/offer is lowest/most advantageous to the program with price as the primary factor;

- award fixed-price or cost-reimbursable contracts, as specified by the CE, or State agency, as applicable; and
- monitor the resulting contracts on behalf of the CE as required by USDA regulations.

CEs are responsible for monitoring contractor performance to ensure compliance with all contract provisions.

Procurement

The agent must apply USDA procurement requirements for all purchases made on behalf of the CE, including State and local procurement requirements if more restrictive as long as these regulations are not in conflict with USDA regulations. The solicitations and contracts for all purchases that the agent procures on behalf of the CE must include a statement that USDA regulations must be followed. It is the CE's responsibility to retain documentation required to demonstrate compliance with regulations.

- *Credits, Discounts, Rebates, and USDA Foods Values:* If there are financial transactions that include credits, discounts, or rebates, the agent must provide the CE with the credits, discounts, and rebates. If any transactions conducted by the agent involve USDA Foods values, the agent must insure that the CE receives these credits. In these cases, the agent must provide the CE with documentation that demonstrates compliance.
- *Material Change:* Material change requirements apply to a procured agent. Therefore, the solicitation and contract must clearly describe the expected services to be provided by the agent over the course of the contract.
- *Pre-Existing Contractual Relationships:* Agents may not use pre-existing contractual relationships instead of conducting a competitive procurement on behalf of a CE.
- *Price:* A price based on a cost plus percentage of cost is not allowed for any purchases made on behalf of the CE by an agent. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

Conflict of Interest

An agent, agent's parent company, or subsidiary company of the parent company or the agent publishing a solicitation on behalf of a CNP operator (or CNP operator-only cooperative) cannot respond to this solicitation. Responding to this solicitation would constitute an unfair advantage and be in violation of Federal procurement requirements.

Consultant Contracts

Consultant contracts are intended to provide short-term or temporary services when a CE lacks the necessary resources, skills, and abilities to manage and operate the program effectively and in compliance with regulations.¹⁰¹ Short-term or temporary services may include a single consultation or a series of consultations over a defined period of time.

For Example:

- *Kitchen equipment specialist provides suggestions for improving the service line equipment and recommendations for an equipment replacement schedule.*
- *Registered dietitian provides recommendations related to students with medical accommodations, new recipes, and recommended menu items for unpopular meals.*

[NOTE: For small or rural CEs, consultant contracts are also used when budgets and staff limitations do not support a wide range of specialized skills. However, in these cases, a consultant's contract still cannot include implementing or managing the day-to-day operations of the program.]

If the consultant services include implementing or managing the day-to-day operations of the program, a food service management contract should be used instead of a consultant's contract.

Franchise Agreements

The services and/or products of a franchise agreement must be properly procured through a competitive process and the income and costs generated by the agreement must be compliant with the financial regulations as well.¹⁰² This includes, but is not limited to, the following requirements:

- All equipment purchases with food service funds must be properly procured.
- Franchise agreement restrictions must not create circumstances that cause the CE to be noncompliant with the meal pattern or other program requirements.
- Franchise agreements must have a duration of no more than one year and may include an option for renewal clause.¹⁰³
- Operational practices of the franchise must be in compliance with all applicable local and state health and safety regulations related to the purchase and resell of food under the franchise agreement.

It is the CE's responsibility to ensure that all terms and conditions of the franchise agreement and operation of franchise are compliant with all local, state, and/or federal regulations. To ensure that the franchise agreement is compliant with regulations, TDA recommends that the CE consult with its legal counsel before creating a franchise agreement.

¹⁰¹ Before procuring a consultant, a CE should contact its ESC child nutritionist to see if the ESC is able to provide the needed support. See Administrator's Reference Manual, Section 22, Food Service Contracts for additional information on this topic.

¹⁰² See the *Administrator's Reference Manual, Section 14, Financial Information Concerning School Nutrition Funds* for additional information on this topic.

¹⁰³ A renewal clause cannot be automatic. Non-FSMC contracts may be renewed for an additional year three times.

Procurement, USDA Foods Processing

A CE must competitively procure its USDA Foods processor. Moreover, any entity acting on behalf of the CE must also competitively procure its USDA Foods processor. CEs must take care after they have signed a contract with a processor not to add (piggyback) other purchases and/or services that will create a material change to a contract.¹⁰⁴

The CE must also ensure that the USDA Foods values are credited back to the CE by its processor. The processor must provide adequate documentation to demonstrate that the crediting was done correctly. The Food Distribution Program Handbook is available at www.squaremeals.org for details on USDA Foods. *Administrator's Reference Manual, Section 21, USDA Foods* also provides additional guidance.

Vendor List

For non-FSMC contracts, a CE may use a vendor list that the CE established when awarding contracts as long as the following criteria are met:

- The CE must have written procedures and/or processes for how it will use vendor lists.
- The CE must include a statement in the solicitation that the contract will be awarded to an entity on a vendor list.
- The CE must include a description of how a vendor is approved to be on the list.
- The CE must ensure that the use of a vendor list does not limit competition.

Awarding the Contract

The CE must award the contract to the offeror that is most responsible and responsive to the solicitation based on the most cost effective use of federal funds. CEs must retain documentation demonstrating why the offeror was awarded the contract. In the evaluation process, the CE must not consider nonresponsive or overly responsive¹⁰⁵ features—the CE must only consider the responsive elements in the bid in its evaluation. A contract that is awarded based on incentives, investments, and/or value-added or overly responsive offers has not been properly procured.

¹⁰⁴ See the *Material Change* subtopic in the *Contracts* subsection in this section for additional information on this topic.

¹⁰⁵ An overly responsive feature is one that is not requested in the solicitation.

For Example: The CE listed a specification that the POS system automatically generate a letter to households to notify them about a student's eligibility. A responsive offer would provide information on how the vendor's system provides notification. An overly responsive offer would provide information on how the vendor's system provides notification and additional information on how the vendor's system automatically sends emails to households about a student's account.

Cost as Primary Consideration

No matter the type of contract, cost must be the primary consideration in awarding a contract.

For all contracts, the contract is awarded to the offer that meets all of the terms and conditions described in the solicitation with cost as the primary consideration. Primary consideration means giving the cost criteria the greatest weight among all criteria.

For Example: A CE has five criteria in the solicitation evaluation. The maximum possible points are given according to the following distribution:

<i>Criteria</i>	<i>Possible Points</i>
<u>Cost</u>	<u>35</u>
<i>Financial stability, business practices</i>	5
<i>Reporting systems</i>	10
<i>Product specifications and/or technical requirements</i>	30
<i>Delivery schedule</i>	20

In this case, cost is the primary consideration — cost is given the highest number of points among all of the criteria.

A CE, or any entity acting on a CE's behalf, must not make a purchase or award a contract with a cost plus a percentage of cost pricing structure.

Contract Negotiation

When a solicitation contains qualitative elements, it is common for guidance to use the word *negotiate* when CE determines which offer will be awarded the contract. In these cases, the word *negotiate* does not mean that there is a give and take interchange resulting in a contract—a give and take approach may stifle full and open competition¹⁰⁶ if it creates options that were not addressed in the solicitation. Instead, for this purpose, *negotiate* means that the CE may seek clarification or obtain equivalent elements—not negotiate equal specifications and/or technical requirements.

As the CE evaluates the offers submitted, it may find that several vendors are responsive to the solicitation but have very different approaches. In this case, the CE may conduct *negotiations* with the contractors of the top ranked offers (s) to ask for clarification about the responsive features. The CE may ask each contractor to further explain how it will address one of the specifications and/or technical requirements or to further describe a process or product included in the offer.

For Example: The CE should not say Contractor A is also offering to provide this special service or product: Can you?

¹⁰⁶ See the *Full and Open Competition* subsection in this section for additional information on this topic.

These *negotiations* are not intended to give one contractor an advantage over another; they are intended to make sure the CE has a clear understanding of what each contractor is offering. At the end of the negotiation, the CE will award the contract to the most responsible and responsive contractor.

After all offerors have provided clarification, the CE may also ask all or the top offerors to resubmit a *best price and final offer*.¹⁰⁷

Awarding a Cost Reimbursable Contract

A cost reimbursable contract is effective when there are uncertainties involved in the contract performance affecting price estimates. The contract is awarded to the vendor conforming to all the material terms and conditions of the solicitation and with cost as the primary consideration.¹⁰⁸ A cost reimbursable contract cannot be awarded using an IFB solicitation; it must be awarded using an RFP solicitation.

Awarding a Firm Fixed-Price Contract

A firm fixed-price contract is most effective when there are clear and detailed specifications and/or technical requirements. The contract is awarded to the vendor conforming to all the material terms and conditions of the solicitation and whose offer or bid includes the best price. A firm fixed-price contract may be awarded using an IFB solicitation or an RFP solicitation.

Awarding a Noncompetitive (Including Sole Source) Contract

Before a CE can award a contract to a noncompetitive provider,¹⁰⁹

1. The CE must conduct *negotiations*¹¹⁰ with the contractor for the procured purchase that includes price and terms using the same procedures that would be followed for competitive offers. These *negotiations* are intended to ensure that the CE receives the best possible price since full and open competition¹¹¹ for the products and/or services is not available.
2. TDA must approve all sole source contract awards.¹¹²

¹⁰⁷ When an offeror submits a *best price*, the offer may be a lower price or the same price.

¹⁰⁸ See the *Primary Consideration* topic in the *Awarding the Contract* subsection in this section for additional information on this topic.

¹⁰⁹ See the *Noncompetitive Method* subsection in this section for more information on this topic.

¹¹⁰ See the *Contract Negotiation* subsection in this section for additional information on this topic.

¹¹¹ See the *Full and Open Competition* subsection in this section for additional information on this topic.

¹¹² See the *Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition* page located after the table of contents for information on how to contact TDA regarding a sole source contract.

If one contractor offers a product and/or service that is equal to another contractor's product and/or service but has additional special features beyond the specifications and/or technical requirements in the solicitation, the CE must be able to document why those additional special features are required, not just preferred.

Special Situations, Awarding the Contract

CEs must use the following guidance in awarding a contract:

Awarding a Contract to an offeror Other Than Lowest Cost Offeror

There are cases where a CE can choose not to award a contract to the offeror with the lowest cost—when the lowest offeror is not the most responsible and responsive.

If the CE chooses to award the contract to a contractor that is not the lowest cost offeror, the CE must have adequate justification and documentation. In these cases, the CE must retain all documentation related to that justification.

In these cases, the contract must be awarded to the contractor that is most responsible and responsive to the solicitation as demonstrated by the score on the rubric or scale used to evaluate offers.

Awarding the Contract to Multiple Contractors or Splitting the Contract

The CE may award the contract to multiple contractors or split the contract as long as the CE has provided notice of this possibility in the solicitation.

Offers Received After the Due Date

The CE does not need to open offers received after the due date. To provide an accurate record, the CE may record the names of offerors and date of receipt in a log in case there is a protest. The CE should address how it will handle offers received after the due date in its written procurement procedure and indicate that it will not accept offers after the due date in the solicitation.

Common Reasons for Not Awarding the Contract

Common reasons for not awarding the contract to the lowest offeror may include the following:

- The offer is not responsive to the specifications and/or technical requirements.
- The offeror is not responsible, i.e., contractor's integrity as documented by record of past performance or references indicates a poor record of meeting expectations.
- The financial and technical resources of the contractor are not adequate to demonstrate the contractor is responsible.
- There is evidence of the contractor's noncompliance with public policy.

Consultant Contracts, Expenses

If a consultant contract or agreement will include expenses, including travel, these expenses must be included in the offer in order for the offer to be responsive.

The CE may allow the offeror to provide an estimate of expenses, but the estimate must be a realistic expectation of the costs based on the specifications and technical requirements provided in the solicitation.

If a consultant's offer is written so that expenses (including travel) are to be charged to the CE as separate line item costs, but there is no amount allocated in the offer for this purpose, the payment of expenses is an unallowable expense to the school nutrition program.

For expenses to be allowable, the offer and resulting contract must include a reasonable expectation of total costs by type of expense.

If the scope of work changes and necessitates an increase in the consultant's expenses, additional expenses may constitute a material change which may result in a rebid of the contract.

No Offers Received

If a CE releases a solicitation and no offers are returned, the CE should first determine if there was a problem with the solicitation.

- If there were problems with the solicitation, the CE must restart the procurement process and address all limitations.
- Unless this solicitation is for an FSMC contract, the CE may also decide to use an RFP instead of an IFB.

The following questions will assist the CE in determining what steps to take to address:

- Was the notice (or solicitation) sent to all potential offerors?
- Was sufficient time allowed for potential offerors to respond?
- Were specifications and/or technical requirements unduly restrictive so offerors were not able to bid?
- Were unrealistic procurement or delivery schedules included or requested?

Nonresponsive or Overly Responsive Offers

If an offeror does not submit an offer that is responsive to the specifications and/or technical requirements described in the solicitation, the offer is considered nonresponsive or overly responsive. A nonresponsive or overly responsive offer cannot be awarded the contract.

Any extra products and/or services not described in the solicitation that are included in the offer are nonresponsive or overly responsive elements. The CE cannot consider the nonresponsive or overly responsive elements in awarding the contract. Extra products and/or services include, but are not limited to, the following:

- Additional equipment
- Prizes
- Stamps that can be used to obtain another item or service
- Scholarships

Opening Offers Prior to the Due Date

A CE may open offers before the due date to check for minor problems (i.e., missing date, signature without printed or typed name). This check for minor problems cannot be used to change the offer—it can only be used to provide notice to the offeror and allow the offeror to correct minor errors. However, to ensure that the procurement process is fair and open, the CE should open and check the offers before the due date has passed and send a notice to every offeror at the same time with the same revision deadline to submit a correction before due date (i.e., 24 hours).

Request for Best Price

The CE may ask the top offeror(s), as determined by the rubric/scale evaluation, to resubmit a best possible price before awarding the contract. If the CE chooses to make this request, the CE cannot change the specifications and/or technical requirements provided in the solicitation or change its rubric/scale used for evaluating offers. The offeror is also not required to change its offer. While the request for the best price allows the CE to see if it is possible to obtain a more competitive price, it is not intended to be a give and take negotiation.

Request for Clarification

If the CE determines that an offeror is the most responsible and responsive as demonstrated by the score on the rubric or scale used to evaluate offers or the price, but the offeror does not fully respond to one of the specifications and/or technical requirements, the CE can request additional information to determine if the offeror can meet the specification and/or technical requirement as long as the CE does not provide additional information other than what was on the original solicitation document.

Based on the clarification provided by the offeror, the CE may award the contract or ask for a rebid. Asking for a rebid is often the best action particularly when the clarification provided by the offeror demonstrates the specifications and/or technical requirements in the solicitation were not clear.

Contracts

Once an offeror has been awarded a contract, the CE works with the contractor to create a contract that reflects the specifications and/or technical requirements laid out in the solicitation.

A contract is

a formal, legally enforceable agreement (terms and conditions) between a buyer (the CE) and a seller (contractor) that clearly and accurately describes the products and/or services to be delivered or performed and sets forth the method and the compensations the contractor receives when products and/or services are provided.

A CE must ensure that all contracts are the result of proper procurement procedures. All contracts, no matter the procurement method, must be awarded to a responsible and responsive offeror whose offer is the most advantageous to the program. For a fixed-price contract, the bid is awarded to the most responsible and responsive offeror with the best price. Third-party entities that procure on behalf of the CE are required to follow this same guidance.¹¹³

While a CE using a small purchase method may not have developed a solicitation that is comparable to one developed for an IFB or RFP, the CE must document activities and processes related to the following:

- Method or strategies used to obtain offers
- Product and/or service specifications and/or technical requirements communicated to potential offerors
- Cost quotes submitted by offerors

It is the responsibility of the CE to ensure that the contract requirements mirror those found in the solicitation and that all of the terms of the contract are being met. Any costs arising from a contract that was improperly procured are unallowable to the school nutrition program.

¹¹³ In cases where third-party entities have the capability to provide additional products and/or services, but these products and/or services were not part of the original solicitation, purchasing these products and/or services without proper procurement may result in unallowable cost. An unallowable cost or expense cannot be paid using school nutrition program funds.

Elements of a Contract

The following elements, at a minimum, should be included in a contract.

General Contract Requirements

- Contract duration
- Identification of the parties in the contract
- Required compliance certifications
- Type of contract (i.e., fixed price or cost reimbursable with fixed fee)

Contract Management

- Contract renewal options, including terms, conditions, and (as applicable) provisions for price changes

[NOTE: Non-FSMC contracts may be renewed for an additional one year three times. After the third renewal, the contract must be rebid.]

- Contract termination rights for cause and convenience
- Contractor recordkeeping requirements
- Default and breach of contract provisions, remedies, cancellation procedures, and penalties

For Contracts in Excess of \$10,000

- Termination for cause and for convenience clause with an explanation of when the clause applies and the basis for settlement

For Contracts That Exceed the Simplified Acquisition Threshold

- Administrative, contractual, or legal remedies in instances where contractors violate breach of contract terms which includes sanctions and penalties as appropriate

[NOTE: The most restrictive simplified acquisition threshold local or state that applies. See the Procurement Purchasing Methods subsection in this section for additional information on the simplified acquisition threshold.]

- Procedures for contract modification

Invoicing and Payments

- Method for tracking costs to ensure that the CE receives discounts, rebates, credits; USDA Foods values; and other applicable credits

[NOTE: CEs may include a requirement for a routine auditing procedure as defined in the solicitation.]

- Method to ensure that an adjustment or escalation clause is applied both upward and downward in alignment with the index at the frequency as described in the solicitation
- Procedure for issuing payments, including sufficient information included on invoices to determine if costs are allowable

- Ownership of any equipment or software purchased by the contractor on the CE's behalf or for the contract
- Procedures for contract modification
- Required compliance certifications
- Sanctions for noncompliance

Other Requirements

- Laws and regulations that govern the contract including the provisions described in the *Other Regulatory Contract Requirements* subsection of this section.

Products and/or Services to Be Provided

- Product specifications and/or technical requirements
- Professional certification requirements or minimum levels for required experience or education¹¹⁴
- Sanitation and licensing requirements
- Scope of work (i.e., a detailed description of duties to be performed, hours of work, performance descriptions, levels of performance, and required outcomes)

Viable IFB (Sealed) Bid Requirements

For a sealed bid to be awarded a contract, the following conditions must be met.

- A firm fixed-price contract award will be made in writing to the lowest responsible and responsive offeror. When specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must 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 triggered.
- All offers must be publicly opened at the time and place prescribed in the invitation for bids (IFB) solicitation.
- Any or all offers may be rejected if there is a sound documented reason.
- If the IFB required a separate presentation of a bid bond, coversheet, or attachment for the offerors to use to demonstrate compliance with the IFB's responsiveness criteria, these documents may be pre-screened to determine if the bid is responsive.
- Two or more responsible offerors are willing and able to compete effectively for the business.

¹¹⁴ See *Administrator's Reference Manual, Section 25, Professional Standards* for more information on requirements for continuing education/training and hiring for school nutrition program staff.

Dispute Resolution

A well-written contract provides a method to resolve any disputes whether the dispute is caused by poor communication or results from a possible breach of the contract. The written contract should include clauses which make resolution of problems, including litigation, mediation, or arbitration, feasible and economically viable. CEs may want to consult with an attorney on the appropriate contract statement necessary to address dispute resolution.

For Example: When an attorney fee clause which stipulates that the loser pays the prevailing attorney's fees is added to a contract, it makes litigation financially possible, and it serves as a motivator for all parties to adhere to the contract because there is a cost for breach of contract other than losing the contract.

Duration of Contract

For the school nutrition program, the duration for all contracts may be less than one year, but must not be longer than one school year with an option to renew. It is common for CEs or contractors to say that they have a multi-year contract; however, the school nutrition program does not allow contracts for a term of more than one year. There is an option to renew for three additional contract periods.¹¹⁵ Non-FSMC contracts may be renewed for an additional year three times. FSMC contracts may be renewed for an additional year four times. If there is a material change, the contract must be rebid.¹¹⁶

Once a CE has a signed contract, the CE is not free to obtain offers or quotes for the contracted products and/or services from another contractor or to purchase the same products and/or services from another contractor unless one the following circumstances occur:

- The specified quantity of product as written into the contract has been purchased.
- The amount to be purchased is in addition to the quantity of the products and/or services stipulated in the contract. In this case, the CE is still obligated to purchase the quantity specified in the contract.

If the situation is appropriate for the CE to purchase from a second contractor, the CE must use the appropriate informal or formal procurement method for the purchase.

When CEs consolidate, current contracts or purchasing agreements are null and void.

¹¹⁵ See *Administrator's Reference Manual, Section 22, Food Service Contracts* for additional information on the duration of a consultant's contract.

¹¹⁶ See the *Material Change* subsection in this section for additional information on this topic.

Material Change

When a CE allows a winning offeror to make changes to contract terms that are materially inconsistent with the original solicitation for the contract, the CE has undermined full and open competition¹¹⁷ by denying all possible contractors the opportunity to compete under the same terms and conditions.

Anticipated Change

Changes in the terms and conditions of the contract include, but are not limited to, quantity and scope of the products and/or services to be provided. If the CE stipulates expected changes in the solicitation, all potential offerors are able to include that information in their offer—it is a full and open competition and unlikely to be a material change.

The CE must rebid the contract when a change in purchasing products and/or services is inconsistent with the underlying solicitation on which the contract was based—a material change.

Any costs arising from improper procurement are unallowable to the school nutrition program.

A material change most often occurs in one of two situations:

- When the solicitation does not mirror the contract.
- When a change is made to a contract that alters the terms and conditions of the contract substantially enough that other potential contractors who responded to the solicitation may have bid differently and more competitively if they had known about the altered terms and conditions.

Making changes to the contract terms includes the purchase of products and/or services not included in the contract or within the terms of a contract renewal.

*[NOTE: A solicitation that is written to be an open-ended procurement of additional products and/or services is likely to be an inappropriate procurement. When procurement is not done correctly with full and open competition, the cost of the contract and legal defense of the contract are unallowable expenses to the school nutrition program.]*¹¹⁸

Forecasting is an essential tool to make sure that a material change does not occur.¹¹⁹ If a CE anticipates enrollment growth or a reconfiguration of site attendance zones, the CE should consider adding the anticipated changes to the solicitation and contract. However, even if the solicitation and contract include flexibilities based on anticipated

¹¹⁷ See the *Full and Open Competition* subsection in this section for additional information on this topic.

¹¹⁸ See the *Ways to Use Listed Items in Solicitation Documents* topic in the *Solicitation* subsection of this section for additional information on this topic.

¹¹⁹ See the *Forecasting* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on this topic.

growth or reconfigurations, the CE must still evaluate the impact of growth or reconfiguration to determine if a material change has occurred. Any increase in the purchase of products and/or services that is not reasonable may be a material change and may require a rebid of the contract.

Material Change, Determination

The CE must consider the following issues when determining if there has been a material change:

Increase or Decrease to the Cost of the Contract

If there was an increase or decrease to the cost of the contract, would the increase or decrease in cost have caused offerors to quote the cost of products and/or services differently if the increase or decrease had existed at the time of the solicitation?

If yes, it is a material change. The CE must rebid the contract.

Increase or Decrease in the Products and/or Services

Would the prospective change materially affect the scope of services, types, and/or volume of the products and/or services in both the solicitation and resulting contract?

If yes, it is a material change. The CE must rebid the contract.

New Products and/or Services

Are there new products and/or services added to an existing contract?

If yes, it is a material change. The CE must rebid the contract.

If there is a material change to the contract and the CE does not rebid the contract, any contractor that responded to the solicitation and did not win may file a protest to the contract award.¹²⁰

¹²⁰ See the *Protests* subsection in this section for additional information on this topic.

Protests

An interested party¹²¹ may protest any of the following situations:

- Solicitation or other request for offers for a contract for the procurement of property or services
- Cancellation of a solicitation or other request
- Award or proposed award of a contract
- Termination of a contract, if the protest alleges that the termination was based on improprieties in the administration of the contract.

CEs and any entity acting on their behalf must have written procurement procedures in place to address and resolve protests or disputes relating to procurements.

- The CE and any entity acting on their behalf must follow its written procedure to resolve protests.
- It is the CE's responsibility to ensure that all protests are resolved.
- The CE and any entity acting on their behalf must retain all documentation related to protests.
- The CE must notify TDA when a protest is received.¹²²

The USDA Food and Nutrition Service (FNS) will also accept protests related to solicitation from a protestor directly if the following conditions have been met:

- The contract was made in connection with the School Nutrition Program (SNP).
- The protestor has exhausted all administrative remedies with the CE and any entity acting on the CE's behalf (grantee and subgrantee) before pursuing the protest with FNS.
- Violations of federal law or regulations and the standards of this section exist.¹²³
- Violation of a CE's or entity acting on CE's behalf (grantee or subgrantee) protest procedures exists for failure to review a complaint or protest.

Protests received by FNS other than those specified above will be referred to the CE or the entity acting on behalf of the CE (grantee or subgrantee).

¹²¹ An interested part is defined as any entity or person who may be affected by a situation, any entity or person who has a real or direct interest in action being proposed or taken.

¹²² See the *Contract Information for the Texas Department of Agriculture (TDA), Food and Nutrition* which follows the table of contents for information on contracting TDA.

¹²³ Violations of state or local law will be under the jurisdiction of state or local authorities.

Managing the Contract

The CE must have procedures in place to ensure that contractors perform in accordance with the contract or purchase order terms, conditions, specifications, and technical requirements. This includes, but is not limited to, verifying the following:

Cost Adjustment and Escalation

- Index used for an adjustment or escalation clause is applied correctly. Cost adjustments include that the index stipulated in the contract is the one used by the contractor for any cost adjustment or escalation as well as the contractor returning funds to the CE if there is a downward adjustment if the index indicates that prices should be lowered. Documentation related to cost adjustments and escalations must be retained.

Credits, Discounts, and Rebates and USDA Food Values

- Applicable credits, discounts, and rebates are given to the CE. CEs may elect to include an audit clause in their solicitation and contract that is linked to payment. These clauses require the contractor to provide documentation that demonstrates compliance at regular intervals or the contractor will not receive payment. Documentation related to credits, discounts, and rebates and USDA Food values must be retained. This requirement applies to FSMC cost reimbursable contracts.
- Applicable USDA Foods values are awarded to the CE.
- A contractor cannot honor the contract terms and conditions related to credits, discounts, and rebates by providing another product (like or unlike) to the CE to cover the rebated value. The CE must receive the credit, discount, or rebate by one of the following methods:
 1. Actual credit or discount amount, documented on an invoice or statement
 2. Rebate payment in cash, documented as appropriate
 3. Applied value, documented on an invoice or statement.

Fiscal

- Products and/or services invoiced to the CE are allowable costs including that the contractor separately identifies the following for each cost submitted for payment:
 1. Cost that is allowable and may be paid from the nonprofit food service account and

2. Cost that is unallowable and must be paid from sources other than the school nutrition food service account.
 - Products and/or services received from the contractor correlate to the contractor’s invoices.
 - Products and/or services procured by a third-party entity acting on the CE’s behalf were procured correctly.
 - Documentation related to the cost of products and/or services must be retained.

Specified Products and Services

- Products and/or services provided to the CE are representative of the products and/or services to be delivered as described in the solicitation and the contract.
- Products and/or services delivered meet the specifications and/or technical requirements described in the contract.

Payments for Cost Reimbursable Contracts

The CE must not make any payment to a contractor for any cost resulting from a cost reimbursable contract that fails to include the requirements in this section. The CE must not make any payments to the contractor in excess of the contract’s actual, net allowable costs for a cost reimbursable contract.

Ensuring That Purchases Align to the Solicitation and Contract Specifications and/or Technical Requirements

CEs are expected to honor all contracts, whether those contracts are the result of informal or formal procurement methods. The purchase of an additional product and/or service offered by a vendor that is not included in the solicitation (i.e., added to an existing contract) may constitute a material change and may result in unallowable costs.¹²⁴ CEs should exercise caution when purchasing any additional products and/or services from a vendor that is not included in the original solicitation and contract.¹²⁵

In the solicitation, each product and/or service has a description which includes the quantity to be purchased. When the contract is awarded, the CE is obligated to purchase the products and/or services listed on the contract from the contractor. The CE cannot buy these items from another vendor unless the quantity described in the contract has been exhausted, or the contract has been legally terminated. When the quantity is exhausted or the contract has been legally terminated, the CE must correctly procure the products and/or services through a new solicitation.

¹²⁴ An unallowable cost or expense cannot be paid using school nutrition program funds.

¹²⁵ See the *Ways to Use Listed Items in Solicitation Documents* topic in the *Solicitation* subsection of this section for additional information on this topic.

Additional Purchases

A CE cannot add products and/or services to a contract unless the increase in products and/or services are named and described in the original solicitation/contract as an anticipated increase based on enrollment projections, school reorganization, or program participation. A general statement that the CE will add up to a specific number or a specific percentage of *new* products and/or services is not sufficient to allow additional purchases. All purchased items must be procured correctly. This includes new product lines. Adding products and/or services is also called *piggybacking*.

Response to Poor Contractor Performance

When a contractor fails to deliver products as prescribed in the contract or delivers items that do not meet the specifications and technical requirements of the contract, it is the CE's responsibility to ensure that the contractor is providing the products and/or services as described in the contract.

To raise the issue with the contractor, the CE should contact the contractor and tell the contractor specifically how the problem is to be corrected in order to meet the specifications and/or technical requirements for the products and/or services as described in the contract. When the CE contacts the contractor about problems, the CE must also keep a record of the dates of all phone calls or other contacts with the contractor and what was discussed. This documentation is required for procurement records retention and will also be useful if the contractor does not resolve the problem.

If the problem is not resolved, the CE should provide the contractor written notification of the problem and state that immediate correction is expected and failure to do so will be considered a breach of contract and could result in the cancellation of the contract. To preserve documentation, the CE should provide this notification by a method that will date stamp the date sent and date received.

If the contractor makes little or no effort to resolve the problem, the CE should implement the dispute resolution process as defined in its written procurement procedures and included in the solicitation and the contract.

If cancellation of the contract becomes necessary, the CE may take steps to disqualify the contractor from future bidding as a non-responsible offeror.

Additional Resources

TDA Resources

- *Approved Purchase List*—Form designed to provide list of products approved to purchase with information that will be helpful to menu planners and staff managing the contract.
- *Budget Tool*—Form designed to assist the CE in tracking various incomes and costs of the program, including cost analysis for products and/or services.
- *Buy American Checklist for Non-Domestic Food Product Purchases*—Checklist to assist CEs in determining if a non-domestic product is acceptable.
- *Procurement Snapshot Tool*—Form designed to provide summary of procurement activities for the program year or fiscal year.
- *Micro-Purchase Log*—Form designed to track purchases made under the micro-purchase method.
- *Informal Small Purchase Log*—Form designed to track offers and offerors for small purchase procurement.

TDA resources are available on the SquareMeals website, www.squaremeals.org.

Institute for Child Nutrition (ICN)

- *First Choice*, a handbook for developing an effective procurement process
Available at www.nfsmi.org/documentlibraryfiles/pdf/20111129111739.pdf
- *Procurement in the 21st Century*, manual providing specific details on the procurement process
[NOTE: This resource is not a guidance document, but it does provide useful information.]
Available at www.nfsmi.org/DocumentDownload.aspx?id=3894
- *State Agency Guidance on Procurement*, a series of web-based trainings on procurement
Available at www.nfsmi.org

USDA

- *Understanding Food Qualities Labels*, a manual provided by USDA's Agricultural Marketing Service (AMS) that provides a guide to product labeling that indicates quality
Available at www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Facetsheet.pdf

Websites

- Texas Procurement and Support Services (TPASS) (Formerly Texas Building and Procurement Commission): www.window.state.tx.us/procurement/
Comptroller of Public Accounts: www.cpa.state.tx.us
- Universal Public Purchasing Certification Council/National Institute of Government Purchasing (NIGP): www.nigp.org
- USDA Farm to School website:
www.fns.usda.gov/farmtoschool/

Records Retention

The CE is required to maintain an organized accounting and financial system that includes documentation that demonstrates compliance with program regulations. Records retained for procurement must be sufficient to detail the history of procurement for each procured product and/or service, including but not limited to rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. CEs have the option to maintain records on paper or electronically.

These records must be accessible to appropriate CE staff members and federal or state reviewers. TDA may request procurement documentation during both offsite and onsite administrative review processes as well as any additional review specific to procurement.

All documentation or records must be kept on file for a minimum of five years for public and charter schools or three years for private schools, other nonprofit organizations, and residential child care institutions (RCCIs) after the end of the fiscal year to which they pertain.

Procurement System

The CE has documentation that demonstrates that CE has established internal controls to promote program integrity. This includes, but is not limited to, documentation that illustrates the following:

- Written procurement procedures including normal processes for cost analysis, selection of procurement method, ethical standards, and other requirements as described in this section
- Processes for effective contract management
- Verification of third-party entity compliance with procurement regulations

Information Box 4

Records Retention

Public and charter schools are required to keep documentation related to school nutrition programs for 5 years.

Private schools, other nonprofit organizations, and residential childcare institutions (RCCIs) are required to keep documentation for 3 years.

Solicitation

Documentation that demonstrates that the CE has issued a solicitation that meets the procurement requirements—this includes, but is not limited to, all solicitation documents released as part of the procurement process and documentation that illustrates the following:

- All offers submitted in response to the procurement solicitation
- Offeror responsibilities including terms and conditions, timeline for major events, and other requirements or expectations
- Potential contractor’s questions and method for sharing answers with other potential contractors
- Cost analysis (price quotes for small purchase procurement)
- Evaluation and ranking criteria for each procured products and/or services, including rubrics, scales, or evaluation tools
- Expectations for the award of credits, discounts, rebates; USDA Foods values; application of adjustment or escalation clauses; and other credits as applicable
- Public advertisement or notification for solicitations
- Specifications and/or technical requirements

Contract

Documentation that demonstrates that the CE has issued a contract that meets the procurement requirements—this includes, but is not limited to, following:

- Actual contracts resulting from all methods of procurement
- Use of the *System for Award Management (SAM)*
- Compliance with all applicable requirements—federal, state, and local
- Health and safety certifications, licensing, or regulations as applicable
- Professional standards as applicable

Special Situations

Documentation related to the following situations:

- Approval to use a sole source procurement or emergency method
- Inability to buy an American product
- Material change, when there is and is not a material change
- Micro-purchase equitable distribution of purchases or reason for inability to do so

- Noncompetitive method procurements
- Preference given for Small and Minority Firms, Women’s Business Enterprise, Labor Surplus Area Firms, and other federal contract requirements as applicable
- Purchases made through a cooperative
- Purchases made through an agent
- Return of credits, discounts, and rebates as well as USDA Foods values to the CE/ as applicable to the type of contract including CEs participating in Group Buying Cooperatives
- Third-party compliance with procurement regulations

Compliance

TDA may take appropriate fiscal action or terminate the Food and Nutrition (FND) Agreement for any CE that is not in compliance with the procurement requirements. Additionally, TDA will assess compliance with the accounting and financial requirements based on the documentation that CE has submitted throughout the year as well as documentation submitted for offsite and onsite administrative review processes or other procurement review activities.

The cost for any products and/or services that were procured improperly are unallowable costs to the school nutrition program.¹²⁶ This includes any costs that the CE has incurred as a result of intentionally breaking up purchases into smaller amounts to qualify under the micro-purchase threshold or simplified purchase threshold as well as purchases made on behalf of the CE by a third party.

CEs must make available, upon request of the awarding agency (state or federal), any or all of the documentation described in the *Records Retention* subsection in this section.

Obligation of the Contracting Entity (CE) to Report Fraud, Bribery, and Gratuity Violations

CE’s must report, in writing to TDA, all violations of federal criminal law — fraud, bribery, or gratuity.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment. (2 CFR 200.113; 31 U.S.C. 3321).

¹²⁶ An unallowable cost or expense cannot be paid using school nutrition program funds.

Criminal Penalty

The maximum fine for embezzling, willfully misapplying, stealing, or obtaining by fraud, funds, assets, or property acquired under the National School Lunch Act or Child Nutrition Act is \$25,000.

Fraud

Whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program [and/or Special Milk Program] whether received directly or indirectly, shall, if such funds, assets or property are of a value of \$100 or more, be fined no more than \$25,000 or imprisoned not more than 5 years or both; or if such funds, assets or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals or retains for personal use or gain, funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program, whether received directly or indirectly, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.

Termination of the Permanent Agreement for Financial Fraud or Misuse of Funds. If serious deficiencies, such as fraud or misuse of funds occur, and corrective action is not practical, TDA will amend the FND Agreement to terminate the CE's participation in the SNP. In this case, TDA may also refer the matter to the appropriate local, state, and/or federal authorities.